Journal of Air Law and Commerce

Volume 60 | Issue 1 Article 2

1994

Recent Cases and Developments in Aviation Law

Donald R. Andersen

RECENT CASES AND DEVELOPMENTS IN AVIATION LAW

DONALD R. ANDERSEN*

TABLE OF CONTENTS

* Partner, Drew, Eckl & Farnham, Atlanta, Georgia; B.E.S., Georgia Institute of Technology, with honors 1973; J.D., University of Georgia School of Law, *cum laude*, 1976, Order of the Coif, Articles Editor, *Georgia Law Review* 1975-76; member, The Florida Bar and State Bar of Georgia. Commercial pilot, multi-engine and instrument ratings. Mr. Andersen also presented his Recent Developments in Aviation Case Law paper at the 1994 SMU Air Law Symposium.

I. JURISDICTION

A. SUBJECT-MATTER JURISDICTION

THE ISSUE of fraudulent joinder of defendants to defeat federal diversity subject matter jurisdiction was presented in *Ludwig v. Learjet, Inc.*[1] In *Ludwig*, the district court held that the proper standard to use in determining whether a non-diverse defendant had been fraudulently joined was a "reasonableness standard." More precisely, the court stated that "[i]n order to meet this burden, defendant must show that the plaintiff has no *reasonable basis* for a claim against the non-diverse defendant in state court based upon the alleged facts."[2]

Plaintiff had joined the City of Detroit and the airport manager as defendants. Plaintiff alleged that these defendants had breached their duty to maintain the airport properly by permitting inadequate runways, insufficient clear space adjacent to runways, and inappropriate height restrictions for obstacles in the vicinity of the runway.

The court held that under Michigan law, the City of Detroit was entitled to absolute governmental immunity.[3] The airport manager was entitled to qualified immunity and immunity under the public duty doctrine.[4] Under that doctrine, a public employee who owes a duty to the public at

[1] 830 F. Supp. 995 (E.D. Mich. 1993).
[2] *Id.* at 998 (citation omitted) (emphasis added).
[3] *Id.* at 999.
[4] *Id.*

large, rather than a specific duty to any one individual, is entitled to immunity. The court held that the airport manager's duty was a "broad public duty" which does not impose a specific duty to any particular individual.[5] Because the airport manager had not acted personally toward the plaintiff's decedent, he owed no private duty to plaintiff's decedent.[6] Accordingly, the court held that there was no "reasonable basis" for the claims against non-diverse parties and dismissed the case for lack of diversity subject-matter jurisdiction.[7]

Federal subject-matter jurisdiction under the Outer Continental Shelf Lands Act[8] (OCSLA) and federal admiralty jurisdiction[9] were addressed in *Duplantis v. Petroleum Helicopters, Inc.*[10] In that case, an accident occurred in transit to or from an offshore drilling platform. The court held that the mere fact that the helicopter accident resulted in injuries to platform workers who were employed on the Continental Shelf did not bring the case within the scope of federal jurisdiction under OCSLA.[11] Instead, the court stated that the scope of OCSLA is determined by the locale of the accident, not by the status of the individual killed or injured.[12]

The court next considered the possibility of admiralty jurisdiction, noting that the situs requirement is determinative on this issue.[13] The accident occurred in a marshy area averaging three to five feet deep.[14] Defendant conceded that the area "contained 'reeds' that would make actual navigation . . . difficult."[15] The district court held that admiralty jurisdiction is limited to navigable waterways.[16]

---

[5] *Id.*
[6] 830 F. Supp. at 999.
[7] *Id.*
[8] 43 U.S.C. §§ 1331-1356 (1988 & Supp. IV 1993).
[9] 28 U.S.C. § 1333 (1988).
[10] No. 93-1265, 1993 U.S. Dist. LEXIS 12855 (E.D. La. Sept. 10, 1993).
[11] *Id.* at *1.
[12] *Id.*
[13] *Id.* at *3.
[14] *Id.*
[15] 1993 U.S. Dist. LEXIS 12855 at *4.
[16] *Id.* at *4-5.

While early cases defining admiralty jurisdiction as applying to waters "within the ebb and flow of the tide" were intended to define navigable waterways, the court quoted from the U.S. Supreme Court and adopted its reasoning as follows:

> This court is not prepared to hold that water which is subject to the ebb and flow of the tide, but not navigable, should fall within this court's admiralty jurisdiction. As the Supreme Court has repeatedly warned, "in determining whether to expand admiralty jurisdiction 'we should proceed with caution . . . .'"[17]

B. Foreign Sovereign Immunities Act

In *Antares Aircraft, L.P. v. Federal Republic of Nigeria*[18] the Second Circuit Court of Appeals considered the "commercial activity" exception to the Foreign Sovereign Immunities Act.[19] This case involved the conversion by the Federal Republic of Nigeria of a DC-8 aircraft in Lagos, Nigeria. After payment of a Nigerian government claim for overdue landing fees, the Nigerian government failed to release the aircraft for a period of approximately six months, during which time the plane suffered extensive, physical damage as a result of exposure to the elements.

Plaintiff alleged that the "commercial activity" exception to the Foreign Sovereign Immunities Act applied to extend jurisdiction over the Federal Republic of Nigeria. The Second Circuit held that the criteria for the application of the "commercial activity" exception are that the act must be "outside the territory of the United States in connection with a commercial activity of a foreign state" and must cause a direct effect in the United States.[20] While there was no dispute as to whether the act of the Nigerian government was outside the United States and that "[t]he deten-

---

[17] *Id.* at *6 (citing Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 272 (1972) (quoting Victory Carriers, Inc. v. Law, 404 U.S. 203, 212 (1971))).

[18] 999 F.2d 33 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994).

[19] 28 U.S.C. §§ 1602-1611 (1988 & Supp. V 1993).

[20] 999 F.2d at 35 (quoting 28 U.S.C. § 1605(a)(2)).

tion of the aircraft in collection of landing fees were 'in connection with a commercial activity of the foreign state,'"[21] the element of whether there was a direct effect in the United States was sharply in dispute.

The court rejected plaintiff's argument that the financial effect on a United States limited partnership was sufficient to constitute a "direct effect" in the United States.[22] In rejecting this argument, the court noted that there was "no evidence that the use of the aircraft was related to substantial commerce with the United States," that all legally significant acts took place in Nigeria, and that the aircraft was registered in Nigeria.[23] In addition, both the damage to the aircraft and the alleged conversion occurred in Nigeria. Reasoning by analogy to personal injury cases held the citizenship of the plaintiff was not sufficient to support a "direct effect" in the United States, the court held that this case, like personal injury and property damage cases in foreign countries, did not result in a direct effect in the United States simply because the injured party was a United States citizen.[24] Thus, the court affirmed the dismissal of plaintiff's complaint for lack of federal subject-matter jurisdiction under the Foreign Sovereign Immunities Act.[25]

C. Forum Non Conveniens

In *Lu v. Air China International Corp.*[26] the United States District Court for the Eastern District of New York dismissed an action against Air China on the grounds that the accident giving rise to the lawsuit occurred in China and, therefore, would be subject to Chinese law under Article XVII of the Warsaw Convention. In addition, the United States had no public or private interest in resolving this issue in the United States.[27] Although the plaintiff stated

---

[21] *Id.* at 35.
[22] *Id.* at 36.
[23] *Id.* at 35.
[24] *Id.* at 36-37.
[25] 999 F.2d at 37.
[26] 24 Av. Cas. (CCH) 17,369 (E.D.N.Y. Dec. 16, 1992).
[27] *Id.*

that she intended to return to the United States and become a permanent resident at some time in the future, the court did not give any weight to that consideration in finding that the private interest and the public interest strongly favored the dismissal under *forum non conveniens*.[28] The court also noted that the problem of providing any civil litigant with a hearing in the Eastern District of New York

> is acute in light of an ever-expanding criminal docket. Many plaintiffs, who have no alternative forum available to them, wait an inordinate period to have their cases heard. Under such circumstances, the public has a real interest in seeing that limited resources are not devoted to a case having virtually no relation to this district when an adequate alternative forum is so plainly available.[29]

D. Federal Removal

The removal of wrongful death actions against a defendant in bankruptcy from state court to federal district court was at issue in *Coker v. Pan American World Airways, Inc.*[30] The *Coker* decision involved fifty-four Florida state court actions arising from the *Lockerbie* disaster. The procedural background to this decision involved the two decisions of the Second Circuit Court of Appeals in *Lockerbie I*[31] and *Lockerbie II*.[32] In *Lockerbie I*, the Second Circuit held that claims under the Warsaw Convention preempted state law causes of action for international airline accidents.[33] Pan Am's prior attempts to remove the Florida state actions to federal district court had been unsuccessful because the Florida federal district court had ruled that when the Warsaw Convention was raised only as a defense, such a defense

---

[28] *Id.*

[29] *Id.*

[30] Coker v. Pan Am. World Airways, Inc., 24 Av. Cas. (CCH) 17,444 (S.D.N.Y. Mar. 3, 1993).

[31] *In re* Air Disaster at Lockerbie, Scotland, 928 F.2d 1267 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991) [hereinafter *Lockerbie I*].

[32] *In re* Air Disaster at Lockerbie, Scotland, 950 F.2d 839 (2d Cir. 1991) [hereinafter *Lockerbie II*].

[33] 928 F.2d at 1273-75.

does not give rise to federal question jurisdiction and cannot serve as the basis for removal of the state court action to federal court.[34]

Following the attempt at removal, Pan Am filed its petition under Chapter 11 in the U.S. Bankruptcy Court for the Southern District of New York. Pan Am then moved to transfer the Florida state court actions to the U. S. District Court for the Southern District of New York under subsection 157(b)(5) of title 28 of the United States Code, which reads as follows:

> The district court [in bankruptcy cases] shall order that personal injury tort and wrongful death claims be tried in the district court in which the bankruptcy case is pending, or in the district court in which the claim arose, as determined by the district court in which the bankruptcy case is pending.[35]

Initially, the district court declined the transfer under the doctrine of abstention, but the Second Circuit Court of Appeals reversed in *Lockerbie II*, stating that "transfers should be the rule, abstention the exception."[36] Nevertheless, upon remand, it was necessary for the U. S. District Court for the Southern District of New York to consider subsection 1334(c)(1) of title 28, which provides as follows:

> Nothing in this section prevents the district court in the interest of justice, or in the interest of comity with state courts or respect for state law, from abstaining from hearing a particular proceeding arising under Title 11 or arising in or related to a case under Title 11.

Plaintiffs argued that the abstention doctrine should be given special effect in Chapter 7 or liquidating Chapter 11 proceedings.[37] The district court rejected that argument, however, stating that the need to avoid unnecessary waste of the debtor's resources was as important in a liquidating Chapter 11 case as in an operating Chapter 11 case. The court went on to note that "the bankruptcy court's concern

---

[34] *Antares Aircraft, L.P.*, 24 Av. Cas. at 17,445-46.

[35] 28 U.S.C. § 157(b)(5)(1993).

[36] *Antares Aircraft, L.P.*, 24 Av. Cas. at 17,446 (quoting *Lockerbie II*, 950 F.2d at 845).

[37] Plaintiffs cited *In re* Titan Energy, Inc., 837 F.2d 325 (8th Cir. 1988).

with amassing assets and fairly parceling them out does not end when a party moves from reorganization to liquidation."[38] Furthermore, the federal court distinguished the *Titan* case, which involved a purely state law issue of insurance contract interpretation, from the Warsaw claims, which were the subject of the Pan Am action.[39] Finally, the court observed that Pan American was required to defend numerous cases in the federal court, including companion cases filed in federal court by the same plaintiffs who had filed the Florida state actions.[40] The transfer of these actions to the federal district court, where they could be either transferred to the court in which the multi-district litigation was pending pursuant to section 1407 of title 28 or dismissed on the grounds of preemption, would avoid the need for duplicative litigation by the debtors.[41]

The availability of bankruptcy court removal of state court actions and dismissal under the doctrine of *forum non conveniens* was addressed in *Baumgart v. Fairchild Aircraft Corp.*[42] *Baumgart* involved the crash of a Fairchild Metroliner III aircraft operated by a German airline. Plaintiffs were nineteen German citizens who originally filed their action in Texas state court. Defendant Fairchild Aircraft Corporation filed a petition for Chapter 11 bankruptcy protection for unrelated reasons, and thereafter removed all nineteen cases to federal court. Fairchild then moved to dismiss the cases under the doctrine of *forum non conveniens*,[43] and the district court granted the motion.[44]

---

[38] *Antares Aircraft, L.P.*, 24 Av. Cas. at 17,447 (quoting *In re* Titan Energy, Inc., 837 F.2d 325, 333 (8th Cir. 1988)).

[39] *Id.* at 17,446-47.

[40] *Id.* at 17,447.

[41] The court also rejected the argument that Florida should be preferred as the plaintiff's choice of forum, rather than the district court in which the bankruptcy was pending. The court noted that "nothing in the record compels Florida as the obvious forum." *Id.* at 17,447.

[42] Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824 (5th Cir.), *cert. denied*, 113 S. Ct. 2963 (1993).

[43] Texas state courts do not recognize the doctrine of *forum non conveniens* dismissal in personal injury and wrongful death actions. *See* Dow Chemical Co. v. Alfara, 768 S.W.2d 674 (Tex. 1990) ("[The Texas] legislature has statutorily abolished the

On appeal, the plaintiffs argued to the Fifth Circuit that in bankruptcy removal cases the district court did not have jurisdiction to dismiss the case based upon the doctrine of *forum non conveniens.* Instead, plaintiffs argued that the power of the district court in bankruptcy cases was specifically limited to the express grant of jurisdiction found in subsection 157(b)(5) of title 28 of the United States Code.[45] Plaintiffs argued that the express language of the statute precludes a *forum non conveniens* dismissal.

The Fifth Circuit rejected plaintiff's interpretation of subsection 157(b)(5), finding that the statute itself recognized the federal interest in determining the appropriate forum for the litigation.[46] Additionally, the court determined that the cases which permitted federal bankruptcy abstention also supported a conclusion that subsection (b)(5) was not intended to limit the inherent power of the federal district courts to dismiss a case under the doctrine of *forum non conveniens.*[47] In this manner, the court held that the statute was similar to other special venue provisions which had been held not to limit the doctrine of *forum non conveniens.*[48]

Plaintiffs next challenged the district court's grant of the *forum non conveniens* dismissal as an abuse of discretion under *Piper Aircraft Corp. v. Reyno.*[49] First, plaintiffs argued that Fairchild was estopped from moving to dismiss on grounds of *forum non conveniens* because it had previously removed the case to the federal district court. The Fifth Circuit rejected that argument on the ground that a party who removes a case to federal court is not barred from seeking a subsequent dismissal under *forum non conveniens.*[50]

---

doctrine of *forum non conveniens* in suits brought under Section 17.031 of the Texas Civil Practice and Remedies Code.").

[44] *Baumgart,* 981 F.2d at 824.

[45] *See supra* note 35 and accompanying text.

[46] *Baumgart,* 981 F.2d at 833.

[47] *Id.* at 828.

[48] *Id.* at 832.

[49] 454 U.S. 235 (1981).

[50] *Baumgart,* 981 F.2d at 835.

The Fifth Circuit applied the three-part *Reyno* analysis to determine (1) whether there was an adequate remedy available in the alternate forum; (2) whether the private interest factors supported a *forum non conveniens* dismissal; and (3) whether the public interest factors supported a *forum non conveniens* dismissal.[51] The Fifth Circuit found that German law recognizes both products liability and wrongful death causes of action, and, therefore, an adequate remedy existed in Germany.[52] As for the private interest factors, the court determined that most of the physical evidence related to the crash was in Germany; the airline's headquarters were in Germany, as well as all of the evidence surrounding the maintenance of the aircraft and its operational history; the damages information was in Germany; many of the eyewitnesses were beyond the reach of the U.S. court's compulsory process; and defendant Fairchild would be unable to implead the airline and the co-pilot's estate as third-party defendants if the case were retained in the United States.[53] Finally, language problems would arise if the case were tried in the United States, including the need to translate into English all the documents and investigation reports created in Germany.[54]

The only private interest factors which the court found mitigating against dismissal were that Texas had been the plaintiffs' choice of forum and that potential difficulties might rise regarding enforcement of any judgment.[55] The court noted, however, that Fairchild had agreed to satisfy any judgment to the extent allowed by the bankruptcy plan and that Fairchild submitted to the district court's retention of jurisdiction in the event that any judgments were not satisfied.[56] Based upon the private interest factors, the court concluded that it was unnecessary to review the public in-

---

[51] *Id.* at 835-37.

[52] *Id.* at 835.

[53] *Id.* at 837.

[54] *Id.* at 836.

[55] 981 F.2d at 836.

[56] *Id.* at 836 n.13.

terest factors.[57] Nevertheless, the court held that the district court had properly considered the public interest factors and therefore had not abused its discretion.[58]

II. PREEMPTION

A. PRODUCTS LIABILITY

The issue of federal preemption of state products liability tort claims was addressed in *Cleveland v. Piper Aircraft Corp.*[59] This widely publicized case involved a crashworthiness claim against Piper by a pilot whose Piper Super Cub collided with a parked van on a runway during an attempted takeoff. The pilot sustained serious head and brain injuries, and the jury returned a verdict of $2.5 million in favor of the pilot and against Piper. On the first appeal, the Tenth Circuit held that the trial court had not submitted a proper special verdict to the jury requiring the jury to allocate causation for damages between the so-called first and second collisions. In addition, the instruction did not proportion negligence for the damages caused in the second collision.[60]

On remand, the U. S. District Court for the District of New Mexico held that the case would be re-tried only on the issue of liability and the damage award of $2.5 million in favor of Cleveland was allowed to stand.[61] The court also limited Piper's testimony and exhibits to those submitted in the first trial on liability.[62] The trial court did, however, allow Piper to amend its complaint to add the defense of federal preemption under the Federal Aviation Act of 1958[63] and its corresponding regulations.[64] Having permitted the amendment, the District Court granted the plaintiff's mo-

---

[57] *Id.* at 837.

[58] *Id.*

[59] Cleveland v. Piper Aircraft Corp., 985 F.2d 1438 (10th Cir.), *cert. denied*, 114 S. Ct. 291 (1993).

[60] 890 F.2d 1540, 1546 (10th Cir. 1989) [hereinafter *Cleveland I*].

[61] *Cleveland*, 985 F.2d at 1440.

[62] *Id.*

[63] 49 U.S.C. app. §§ 1301-1557 (1988).

[64] 14 C.F.R. §§ 23.601-871 (1988).

tion for summary judgment on the issue of federal preemption. The court also granted Piper the opportunity to take an interlocutory appeal on the issue of federal preemption, as well as on the pre-trial rulings relating to damages and on the limitations on witnesses and evidence to be presented in the re-trial of the case.[65]

In a lengthy opinion, the Tenth Circuit Court of Appeals examined the claims of federal preemption and the plaintiff's responses in detail. Piper did not base its claim on express preemption, but rather implied federal preemption of state tort actions occupying the field of aircraft design. The doctrine of implied preemption has been applied in cases involving both the obvious intent of Congress to occupy fully a particular field of law and regulation so as to displace state law, or in those instances in which federal legislative or regulatory decisions conflict with state law ("conflict" or "issue" preemption).[66]

Piper contended that the plaintiff's claims were properly characterized as a challenge to the conventional (or tail wheel) design of the aircraft and to the failure to install a rear seat shoulder harness in the aircraft. Plaintiff contended that the issue of forward visibility was whether the rear seat should have been higher than it was, and that the failure to install rear seat shoulder harnesses as standard equipment at the factory (rather than optional equipment) rendered the aircraft defective.

Piper also contended that plaintiff's claims, no matter how characterized, were essentially claims of defective design, and the Federal Aviation Regulations fully occupied the field of aircraft design and impliedly preempted state products liability actions from establishing different standards. Plaintiff responded that the federal standards were "minimum" standards.[67] Plaintiff also pointed to the savings clause which stated that "[n]othing contained in this Act shall in any way abridge or alter the remedies now ex-

---

[65] *Cleveland*, 985 F.2d at 1440.

[66] *See Cleveland*, 985 F.2d at 1443-45.

[67] 49 U.S.C. app. § 1421(a) (1988 & Supp. IV 1992).

isting at common law or by statute, but the provisions of this Act are in addition to such remedies."[68]

The Tenth Circuit rejected Piper's argument that the Federal Aviation Act of 1958 impliedly preempted the entire area of aircraft design.[69] The court based this determination on the facts that (1) the express preemption provisions of the Federal Aviation Act did not specifically include aircraft design; and (2) other expressions of congressional intent to make "air commerce . . . an exclusively federal function" were not directed at aircraft design issues.[70] The court also concluded that the FAA certification process was not intended to be "the last word on safety."[71] Furthermore, the delegated option authority (DOA) adopted by federal statute or regulations only imposes a duty on the FAA to "spot check" a manufacturer's work.[72]

Piper's next federal preemption challenge was under the doctrine of "conflict" or "issue" preemption. The Tenth Circuit noted that the Supreme Court had recently rejected the doctrine of implied conflict preemption in *Cipollone v. Liggett Group, Inc.*[73] However, the court decided that there was no actual conflict in this case, and, therefore, it was not called upon to apply the limitations set forth in the *Cipollone*

---

[68] 49 U.S.C. app. § 1506 (1988). This savings clause was first enacted in 1938 as part of the Civil Aeronautics Act of 1938 and has been included in federal aviation legislation since that time.

[69] *Cleveland*, 985 F.2d at 1444-47.

[70] *Id.* at 1444-45 (citing 49 U.S.C. app. § 1305 (1988)).

[71] *Id.* at 1446-47 (quoting United States v. Varig Airlines, 467 U.S. 797, 807 (1984)) ("The FAA has given manufacturers broad responsibilities for assuring their own compliance by appointing aircraft company employees to 'act as surrogates of the FAA in examining, inspecting, and testing aircraft for purposes of certification.").

[72] *Id.* On this issue, the Tenth Circuit Court of Appeals apparently overlooked the significance of the certification history of the Piper Super Cub, which showed that the Super Cub was certificated by the Federal Civil Aeronautics Administration prior to the initiation of the DOA process. In fact, the certification and flight testing were conducted by CAA employees. Of course, by 1970, the production inspection of the aircraft was conducted under Piper's production certificate, but no manufacturing defects were alleged in *Cleveland.*

[73] ___U.S.___, 112 S.Ct. 2608 (1992). Notwithstanding broad language rejecting implied preemption contained in the *Cippolone* decision, the Tenth Circuit expressed skepticism that *Cippolone* would completely overturn a doctrine that has existed since *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

decision.[74] Instead, the court concluded that the FAA regulations involved did not conflict with the design features which the plaintiff claimed were defective.[75] Specifically, the court stated that the federal regulation required the plane to be designed "so that [t]he pilot's view is sufficiently extensive, clear and undistorted, for safe operation. . . . [It did] not require the precise design that Piper has utilized."[76] Similarly, the court concluded that, while the regulations in place when the FAA approved the aircraft's design did not require shoulder harnesses, such a lack of regulation did not conflict with the plaintiff's claim that shoulder harnesses should have been installed.[77]

The court distinguished the federal aviation regulations applicable to the manufacturer of this aircraft from the regulations under the National Traffic and Motor Vehicle Safety Act,[78] which had been held to preempt state tort claims for failure to install air bags.[79] The court pointed out that those regulations gave automobile manufacturers a choice of equipping cars with any of three types of passenger restraints, including air bags.[80] As to "conflict" or "issue" preemption, however, the Tenth Circuit noted that a closer question would have been presented by later federal aviation regulations, which required manufacturers to choose one of three safety options, one of which used

---

[74] *Cleveland*, 985 F.2d at 1443-44.

[75] *Id.* at 1444.

[76] *Id.* at 1445 (citations omitted). This does not preclude Piper from arguing at trial that CAA approval of compliance with the federal standards shows its design of the Piper Super Cub is, and since 1948 has been, recognized as a "safe" design.

[77] *Id.* at 1445.

[78] 15 U.S.C. §§ 1381-1421 (1988).

[79] 985 F.2d at 1446 (citing the following cases involving preemptive effect of airbag regulations in Safety Standard 208, 49 C.F.R. § 571.208 (1979): Pokorny v. Ford Motor Co., 902 F.2d 1116 (3d Cir. 1990), *cert. denied*, 498 U.S. 853 (1990); Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 994 U.S. 1065 (1990); Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1965 (1990)). *But see* Perry v. Mercedes Benz of N. Am., Inc., 957 F.2d 1257 (5th Cir. 1992).

[80] *Cleveland*, 985 F.2d at 1446.

shoulder harnesses.[81] The court stated that the Piper Super Cub involved in this case was not subject to those later regu-

[81] *Id.* at 1446. The court was referring to the 1969 regulations, found in, 14 C.F.R. § 23.785(g) (1970), for aircraft receiving a type certificate after September 14, 1969, which read as follows:

> Each occupant must be protected from serious head injury by -
>
> (1) A safety belt and shoulder harness that will prevent the head from contacting any injurious object;
>
> (2) A safety belt plus the elimination of any injurious object within striking radius of the head; *or*
>
> (3) A safety belt plus an energy absorbing rest that will support the arms, shoulders, head and spine.

14 C.F.R. § 23.785(C) (1990) (Emphasis added).

The court did not have a reason to consider the 1977 regulations which established new requirements for occupant restraints on all aircraft *manufactured* after July 18, 1978, regardless of the date of the original type certificate. 42 Fed. Reg. 30601 (1977). These regulations expressly required shoulder harnesses in front seats only and provided options for crashworthiness for other seats. *Id.* Those regulations were the result of extensive study by the FAA and public comment as to methods of providing occupant safety, resulting from a 1973 FAA Notice of Proposed Rule Making (38 Fed. Reg. 2985), which would have made shoulder harnesses mandatory at all seats, and which also would have required that all existing aircraft be equipped with shoulder harnesses, if they had been manufactured with structural provisions for attachment of shoulder harnesses. The FAA received substantial adverse public comment for the proposed regulations requiring such shoulder harness installations, and the 1977 regulation reflected a reasoned Agency decision not to mandate rear seat shoulder harnesses, stating that "the decision of whether to install (rear seat) shoulder harnesses . . . should be left to the owner." 42 Fed. Reg. 30602. The FAA also dropped its proposal requiring installation of shoulder harnesses in all existing aircraft having structural provisions for the attachment of shoulder harnesses. Accordingly, as to aircraft manufactured after 1977 without rear seat shoulder harnesses, and possibly as to other aircraft manufactured prior to 1977 with shoulder harness attach points, any state regulation requiring such installation "would, in effect, remove the element of choice authorized [by the regulations]." Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1965 (1990).

Of course, in 1985, the FAA enacted the current 14 C.F.R. § 23.785(g), requiring installation of shoulder harnesses in all the seats of an aircraft manufactured after December 12, 1986. 50 Fed. Reg. 46872 (1985). This development was in part the result of a 1983 petition by the General Aviation Manufacturers Association to make shoulder harness installation mandatory at all crew and passenger seats. 50 Fed. Reg. 19108 (1985). The FAA also amended 14 C.F.R. § 91.14, requiring all occupants to use shoulder harnesses during take off and landing, if installed. Most manufacturers have made retrofit shoulder harness kits available to owners and operators at cost and have issued service publications to each owner and operator, stating that the manufacturers recommend or consider such retrofit mandatory. Manufacturers cannot, however, compel such retrofit in the absence of federal regulations or an airworthiness directive.

lations, and, therefore, the issue of preemption under those regulations was not relevant.[82]

The Tenth Circuit also reversed the trial court on the issue of damages. The court ruled that the $2.5 million verdict might be inconsistent with the court's ruling in *Cleveland I*[83] that the jury must first evaluate the issue of damages arising from the first and second collisions, and then apportion negligence and liability in causing the injuries resulting from the second collision.[84]

The Tenth Circuit generally affirmed the trial court's discretion to limit witnesses and evidence at the second trial but stated that the trial court should be guided by basic fairness and flexibility in order to avoid manifest injustice to one side or the other.[85] Specifically, the court stated that "if a party makes a timely motion to produce new and material evidence which is not otherwise readily accessible or known, the court should, within the exercise of discretion, consider whether the denial of the new evidence would create or manifest injustice."[86]

Similarly, "if . . . witness[es] [were] deceased, ill or for whatever reason otherwise unable to attend the trial, the court should give every consideration to allowing additional witnesses to testify."[87] Of course, cumulative evidence was not to be permitted, but the court stated that "[t]echnical

---

[82] *Cleveland*, 985 F.2d at 1446 n.19. If at the time of its manufacture, an aircraft manufactured prior to July 18, 1978 nevertheless satisfied the 1969 Part 23 regulatory options, even though certificated under the earlier regulations, then preemption by those regulations would seem to be relevant and proper. However, the court did not offer any further explanation for its failure to consider that issue other than to say that the later regulations were not applicable to this aircraft because it was certificated under the earlier regulations. As set forth above, later occupant protection regulations enacted in 1977, particularly those providing occupant restraint options for rear seats, were *expressly made applicable to all aircraft manufactured after July 18, 1978*, regardless of the date of the type certificate.

[83] 890 F.2d 1540 (10th Cir. 1989), *reh'g denied*, 898 F.2d 778 (10th Cir. 1990).

[84] *Cleveland*, 985 F.2d at 1488.

[85] *Id.* at 1450.

[86] *Id.*

[87] *Id.*

rulings should never preclude new and material proofs, [and] common sense should control."[88]

The Eleventh Circuit Court of Appeals in *Public Health Trust of Dade County v. Lake Aircraft, Inc.*[89] (hereinafter *Public Health Trust*) chose to follow the decision in *Cleveland v. Piper Aircraft Corporation.*[90] *Public Health Trust* involved an accident in which an amphibious aircraft slammed into a rock bank during a failed take-off attempt from a lake. As stated by the Eleventh Circuit, "Dee[, who was occupying the passenger seat,] was seriously and permanently injured. The pilot suffered lesser injuries."[91] The Plaintiff's claim was that the metal passenger seat should have been equipped with an "energy-attenuating" mechanism, like the one installed in the adjacent pilot's seat.

The district court had granted the defendant's motion for summary judgment on the grounds that the design of the passenger seat met the applicable federal aviation regulations. The plaintiff had opposed summary judgment on the ground that the federal regulations were not the applicable standard, and, even if they were, the seat had failed to meet those standards. The district court rejected both of these arguments and entered judgment for the defendant, dismissing Dee's action.[92]

The court of appeals reversed the summary judgment, holding that the federal aviation regulations do not impliedly preempt state law claims such as those which provided the basis for Dee's claims in this case.[93] Significantly,

---

[88] *Id.* Contrary to plaintiffs' assertions, the Piper Super Cub had *not* been certificated under the DOA program, but rather had been certificated directly by the Civil Aeronautics Administration in 1948. Indeed, the certification process and flight tests had actually been conducted by CAA engineers and pilots assigned to the certification program, some of whom may still be available to provide additional information as to the design features evaluated in the course of federal approval of the design as providing adequate visibility for safe operation and compliance with the then applicable occupant restraint regulations. Such additional information was not "readily available or known" at the time of the earlier trial.

[89] 992 F.2d 291 (11th Cir. 1993).

[90] 985 F.2d 1438; *see supra* note 59 and accompanying text.

[91] 992 F.2d at 292.

[92] *Id.*

[93] *Id.*

the court researched the issue of preemption by first reviewing the extent of express preemption established by the Airline Deregulation Act of 1978.[94] The court noted that the scope of express preemption under Title IV of the Federal Aviation Act[95] was limited to preemption of state rules which "relat[e] to rates, routes or services."[96] The court then quoted from the majority opinion in the Supreme Court decision in *Cipollone*:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted . . . . Therefore, [courts] need only identify the domain expressly pre-empted by each of those sections.[97]

The court concluded that section 1305 reliably indicates Congress's intent as to the scope of preemption of "matters relating to civil aviation."[98] The court stated the following:

> Under *Cipollone*, we conclude from section 1305 that Congress did not intend to pre-empt state laws on matters unrelated to airline rates, routes or services. Because Dee's design defect claims lie outside the pre-emptive reach of

---

[94] *Id.* at 293 (citing 49 U.S.C. app. § 1305(a) (1978) (current version at 49 U.S.C. app. § 1305(A) (1988))).

[95] Title IV relates to Air Carrier Economic Regulation. Congress enacted 49 U.S.C. app. § 1305 as a part of the Airline Deregulation Act of 1978. It does not, by its terms, expressly encompass any other subchapter, such as Title IV, Safety Regulations. Contrary to the court's analysis, section 1305 has not provided the basis for any claim of preemption (either express or implied) in aircraft products liability cases as a result of such safety regulations.

[96] *Public Health Trust*, 992 F.2d at 293.

[97] *Id.* at 294-95 (quoting Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2618 (1992)).

[98] *Id.* at 295.

section 1305, we conclude that those claims are not preempted.[99]

Unfortunately, the foregoing analysis ignores the scope of implied preemption found in other pre-ADA cases relying upon other expressions of congressional intent contained in the Federal Aviation Act to provide the basis for finding preemption of other "matters relating to civil aviation."[100] Furthermore, the Eleventh Circuit did not consider implied preemption of the field of aircraft design, but instead, merely relying upon the *Cipollone* analysis, concluded that since Congress had provided express preemption in the area of "airline rates, routes and services," it had not intended to preempt any other "matters relating to civil aviation."[101]

More important to future cases involving potential preemption of products liability claims, the Eleventh Circuit also interpreted the Federal Aviation Act to limit the federal role of regulation of aircraft design. The Eleventh Circuit noted that the Federal Aviation Act provided a regulatory framework for issuance of type, production, and airworthiness certificates.[102] However, the court also quoted Congress' grant of authority and responsibility in this field as that of establishing "minimum standards governing the design, materials, workmanship, construction and performance of aircraft . . . as may be required in the interest of safety."[103] The Eleventh Circuit also quoted the

---

[99] *Id.*

[100] *See, e.g.*, City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 635-40 (1973) (pervasive nature of the scheme of federal regulation of civil aviation indicates intent to preempt regulation of aircraft noise).

[101] *Public Health Trust*, 992 F.2d at 295.

[102] *Id.* at 293 n.2. Of course, the Eleventh Circuit did acknowledge the possibility of direct "conflict" preemption, as had the Tenth Circuit in *Cleveland II*, but simply held that no such "conflict" existed between Dee's claims in this case and the federal regulations, as the regulations did not *require* the seat design involved in that case, nor was it one of several federally established express options for safety, even though it was a federally approved design. *Id.* at 295 n.5.

[103] *Id.* at 293 (quoting 49 U.S.C. app. § 1421(a) (1988)). *But see* 49 U.S.C. app. § 1421(a)(6) (1988).

Act's "general 'remedies' savings clause,"[104] which provides that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute."[105]

The Eleventh Circuit avoided the general issue of whether "conflict" preemption may be applied in aviation products liability cases by concluding that there was no conflict between the federally *approved* design involved in that case and any state law claim which might require a different design that "exceeded the minimum federal standards for aircraft design."[106] The court noted that a different result might have been required had the design been *required* by federal law or had the plaintiff challenged the "'defendants' choice between two federally approved options analogous to the federal standards in the airbag cases."[107] Ultimately, the court reversed and remanded the case to the district court.[108]

The Tenth Circuit Court of Appeals decision in *Cleveland II* and the Eleventh Circuit Court of Appeals decision in *Public Health Trust* should not be viewed as precluding all further attempts to raise the preemption defense in aviation products liability cases. As expressly noted by the court in *Cleveland II* and suggested in *Public Health Trust*, future challenges to seat restraint design may present even closer questions of conflict between federal regulations and state common law rules. Preemption analysis is particularly appropriate for (1) aircraft certificated under the 1969 options enacted in Part 23;[109] (2) aircraft manufactured under the 1977 options applicable to all aircraft and enacted in Part 23;[110] and (3) previously certificated CAR 3 aircraft

---

[104] A characterization of the savings clause taken by the Eleventh Circuit from the Supreme Court decision in Morales v. Trans World Airlines, 112 S. Ct. 2031, 2037 (1992).

[105] *Public Health Trust*, 992 F.2d at 293 (quoting 49 U.S.C. app. § 1506 (1988)).

[106] *Id.* at 295 n.5.

[107] *Id.*

[108] *Id.* at 295.

[109] *See supra* note 82.

[110] *See supra* note 82.

manufactured prior to July 1, 1978, but which met the higher 1969 certification options of Part 23 at the time of manufacture.[111]

Similarly, other challenges to aircraft design typically made in products liability cases may also be susceptible to a "conflict" or "issue" preemption defense. For example, many FAA "requirements" or "options" for aircraft, powerplant, and component design and manufacturing involve decisions regarding the acceptable balance between factors such as stability, performance, strength, and reliability, deemed necessary for safety in civil aircraft.[112] To allow state court juries to impose different requirements or to disregard those options in cases involving detailed design, testing, and manufacturing criteria could, in appropriate cases, clearly conflict with applicable federal aviation regulations establishing such requirements or options.

In *Sunbird Air Services, Inc. v. Beech Aircraft Corp.*,[113] plaintiff argued a federal common law cause of action arising from violations of an "implied-in-law federal common law 'duty of manufacturing integrity' and federal common law 'warranty of fitness for flight.'"[114] Plaintiff argued that the federal common law cause of action should be created because the Federal Aviation Act did not create an adequate remedy at law. Plaintiff also argued that aircraft were inherently interstate in nature and there was an unique federal interest which required the application of a uniform federal standard. Finally, plaintiff argued that the relative position of power and knowledge held by aviation manufacturers permitted them to conceal aircraft design defects until after state statutes of repose had run.

---

[111] *See supra* note 83.

[112] *See, e.g.*, 14 C.F.R. Pts. 1 to 59 (1988), and associated federal publications which set forth detailed design, manufacturing, and testing standards, requirements, and options for most significant aspects of general aviation aircraft design and manufacture.

[113] No. 89-2181-V, 1992 U.S. Dist. LEXIS 10814 (E. Kan., June 10, 1992).

[114] *Id.* at *3-4.

While recognizing that the Federal Aviation Act[115] demonstrated the strong federal interest in aviation safety, the court was not persuaded that the Act showed that aviation was "inherently interstate" and required national uniformity in tort laws. The court rejected the plaintiff's analogy to certain total preemption cases that involved primarily federal banking and food and drug laws.[116] Instead, the court recognized that numerous federal courts had acknowledged Congress' ability to create a federal tort statute in the area of aviation products liability, but the fact that Congress had not created such a cause of action demonstrated there was no intent to displace state contract and tort laws. Moreover, the plaintiff's attempt to rely upon the Federal Aviation Act savings clause as providing a basis for an implied federal cause of action also was rejected.[117] Finally, the court noted that the plaintiff was not contending that the defendants had failed to meet the "minimum technical standards established by the Act,"[118] and, therefore, the court was not called upon to determine whether an implied private cause of action would provide a basis for plaintiff's claims.

The decision of the district court in *Sunbird Air Services* should be distinguished from other attempts to apply federal preemption in the field of aircraft products liability law. *Sunbird Air Services* argued for a federal common law cause of action, which would have involved the creation of federal claims, defenses, and remedies wholly apart from those established under state law. Cases such as *Cleveland II* and *Public Health Trust* involved arguments that federal certification, design, testing, and manufacturing standards

---

[115] 49 U.S.C. app. §§ 1301-1557 (1988).

[116] *Sunbird*, 1992 U.S. Dist. LEXIS 10814 at *3-6.

[117] The court noted that the earlier case of Klicker v. Northwest Air Lines, Inc., 563 F.2d 1310 (9th Cir. 1977), which relied upon the savings clause found in the Federal Aviation Act to imply a *federal* common law cause of action, was itself relying on federal common law which existed prior to the enactment of the Federal Aviation Act of 1958. The court stated that "contrary to plaintiff's assertion, that section 1506 represents Congress' intention that state, not federal, common law fill any 'gaps' left by the Act." *Sunbird*, 1992 U.S. Dist. LEXIS 10814 at *12.

[118] *Sunbird*, 1992 U.S. Dist. LEXIS 10814 at *13.

should be applied by courts and, if necessary, by juries in state tort and contract actions, rather than allowing courts and juries to substitute conflicting state design, testing and manufacturing standards.

As set forth above, there are still questions to be addressed with regard to the effect of current federal regulations and preemption in the area of aviation products liability. These include the question of whether specific federal requirements or options in the current federal regulations preempt state law, notwithstanding the "minimum standard" arguments;[119] and, as suggested below, the question of whether punitive damages are permitted in cases in which the defendant has complied with applicable federal regulations.[120]

B. AIRLINE DEREGULATION ACT

1. Personal Injury or Wrongful Death Claims

Federal preemption of state negligence claims for injuries sustained by airline passengers was addressed in *Margolis v. United Airlines, Inc.*[121] The plaintiff was injured by falling overhead luggage. United Airlines sought to dismiss the plaintiff's negligence claims on the grounds that section 1305 of the Airline Deregulation Act[122] preempts any state law related to airline services. Specifically, United Airlines relied upon the 1992 Supreme Court decision in *Morales v. Trans World Airlines, Inc.*,[123] which held that state guidelines regarding airline fare advertising were expressly preempted by section 1305 of the Airline Deregulation Act.

The district court noted that prior to *Morales*, the distinction between preemption of economic or regulatory issues on the one hand, and personal injury, damage, or negli-

---

[119] *See supra* notes 67-69 and accompanying text.

[120] *See, e.g.*, West v. Northwest Airlines, Inc., 995 F.2d 148 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1053 (1994) (preempting punitive damages where airline meets FAA requirements as to passenger reservations and ticketing).

[121] Margolis v. United Airlines, Inc., 811 F. Supp. 318 (E.D. Mich. 1993).

[122] 49 U.S.C. app. § 1305 (1988).

[123] ___ U.S.___, 112 S. Ct. 2031 (1992).

gence issues on the other hand, had been "divided fairly neatly."[124] However, *Morales* very broadly interpreted the scope of *express* preemption based on Congress' use of the phrase "*relating to*" rates, routes, or services. Nevertheless, the district court refused to apply that broad statement of preemption to preempt state common law personal injury and negligence claims in this case.

The court specifically relied upon Justice Blackmun's statement in *Cipollone*,[125] in which he stated that the Court's reluctance

> to find pre-emption where Congress has not spoken directly to the issue appl[ies] with equal force where Congress has spoken, though ambiguously. In such cases, the question is not whether Congress intended to pre-empt state regulation, but to what extent. We do not, absent unambiguous evidence, opt for a scope of pre-emption beyond that which is clearly mandated by Congress' language.[126]

The district court then concluded that Congress had expressed no intent to preempt traditional state law personal injury claims for negligence.[127] Instead, the Federal Aviation Act retains the savings clause addressed specifically to the "remedies now existing at common law."[128] Additionally, the Federal Aviation Act requires airlines to maintain insurance for bodily injury, death, or damage to the property of others. Finally, the court concluded that if the Federal Aviation Act displaced common law actions for damages, then it does not provide a private cause of action or remedy for "money damages or other restitution to a private party."[129] The court stated that "preemption should apply to a state law claim only if Congress has provided a remedy for the wrong or wrongs asserted."[130]

---

[124] *Margolis*, 811 F. Supp at 321.

[125] *Morales*, 112 S. Ct. 2608 (1992).

[126] *Id.* at 2626.

[127] *Margolis*, 811 F. Supp. at 320.

[128] *Id.* (quoting 49 U.S.C. app. § 1506 (1988)).

[129] *Id.* at 324.

[130] *Id.* (quoting Perry v. P*I*E* Nationwide, Inc., 872 F.2d 157, 162 (6th Cir. 1989), *cert. denied*, 493 U.S. 1093 (1990)).

An argument which the district court considered only briefly in *Margolis* was implied preemption under the federal aviation regulations to the extent that a state law negligence claim might attempt to impose different standards on the air carrier pertaining to operation and maintenance of the aircraft, training of airline employees, oral briefing of passengers regarding emergency exits, use of seat belts, and proper stowage and securing of carry-on baggage. The court merely stated that the Federal Aviation Regulations do not "deal with the breach of the duty of care," and that state law "does not attempt to hold [the airline] to a different standard of care from that prescribed by the Federal Aviation Act and the corresponding regulations."[131]

In *Heller v. Delta Airlines, Inc.*,[132] the U.S. District Court for the Southern District of New York also decided the issue of federal preemption of personal injury claims arising from baggage falling from overhead compartments. Following a review of *Morales v. Trans World Airlines, Inc.*,[133] the court agreed with the result and analysis of *Margolis v. United Airlines, Inc.*[134] stating that a state negligence claim for personal injuries due to baggage falling upon the head of a passenger was "too tenuous, remote, or peripheral" to airline services to be subject to federal preemption.[135] Because the federal preemption defense had not been pleaded in the answer, the court held that such a defense

---

[131] *Id.* at 324 n.5. The argument might be made that if each state's negligence law could impose *different* duties than those required under the Federal Aviation Regulations with regard to these specific matters, then the airline would be subjected to different standards of care. This argument would not require dismissal of the state law negligence claim, but would merely preempt the claim in the event that the airline complied with regulations which established the standard of care. Such a result would promote uniformity. Additionally, as to air carrier regulations, there is no statutory basis for arguing that such standards are presumably minimum standards. *Compare, e.g.*, 49 U.S.C. app. § 1421(a)(1) (1988) *with* 49 U.S.C. app. § 1421(a)(6) (1988).

[132] 24 Av. Cas. (CCH) 17,682 (S.D.N.Y. 1993).

[133] 112 S. Ct. 2031 (1992).

[134] 811 F. Supp. 318 (E.D. Mich. 1988); *see supra* note 122 and accompanying text.

[135] *Heller*, 1993 U.S. Dist. LEXIS 11854 at *4 (quoting *Morales*, 112 S. Ct. at 2040).

was not "properly asserted."[136] Finally, the motion to dismiss in *Heller v. Delta Airlines, Inc.*, appears to have been intended as a complete bar to any claims for personal injury, prompting the court to agree with the statement in *Margolis* that preemption under section 1305 was "not intended to be an insurance policy for air carriers against their own negligence."[137]

Margolis and *Heller* demonstrate the courts' concern regarding arguments for total express preemption when other federal regulations do not provide the rule of decision and the remedy.[138] The opinions do not indicate that the defendants attempted to support their total preemption claims on the grounds they had complied with applicable federal regulations. Instead, it appears the defense was that plaintiff's recovery was barred entirely on the grounds that state law could provide neither the rule of decision nor *any remedy* in the face of express federal preemption. Such a broad reading of the express preemption provisions of the Airline Deregulation Act seems inconsistent with the effect of the Savings clause, which is included in the Federal Aviation Act.[139] Of course, such an argument for total express preemption arguably follows as the natural progression from cases such as *Von Anhalt v. Delta Airlines, Inc.*,[140] which applied express federal preemption to totally bar state negligence, defamation, and assault and battery claims arising from denied reboarding.[141] *Von Anhalt* attempts to use section 1305 of the Airline Deregulation Act as a total and complete bar to airline liability in all negligence and personal injury cases (as opposed to requiring application of a federal rule of decision). Such an approach, however, is

---

[136] The federal pre-emption defense was filed after the pleadings were closed. *Heller*, 24 Av. Cas. (CCH) at 17,682.

[137] *Heller*, 24 Av. Cas. (CCH) at 17,684 (citing *Margolis*, 811 F. Supp. at 324).

[138] *But see* Von Anhalt v. Delta Airlines, Inc., 735 F. Supp. 1030 (S.D. Fla. 1990).

[139] 49 U.S.C. app. § 1506 (1988).

[140] 735 F. Supp. 1030 (S.D. Fla. 1990).

[141] Compare *Von Anhalt* with the District Court's reasoning in Levy v. American Airlines, No. 90-Civ.- 7005 (LJF), 1993 U.S. Dist. LEXIS 7842 (S.D.N.Y. June 9, 1993), which takes a more limited issue-by-issue "conflict" approach to federal preemption of state law tort or personal injury claims.

not being met with acceptance by the courts. Instead, as will be seen below, it appears that *total* preemption will be limited to claims arising primarily from, and related to, aviation business or employment practices and not cases due to the failure to meet any duty to provide for the safety of passengers in specific cases involving physical injury or wrongful death.

The decision which most clearly illustrates the tension between the developing law of federal preemption under the Airline Deregulation Act, the preexisting concepts of state court jurisdiction, and the application of state substantive law in air carrier cases is *Burke v. Northwest Airlines, Inc.*[142] The *Burke* action arose out of the death of plaintiffs' decedent in a collision between two Northwest Airlines aircraft on the ground at Detroit Metropolitan/Wayne County Airport on December 3, 1990. The action was initially filed in Texas state court, alleging claims for negligence and deceptive trade practices under the Texas Deceptive Trade Practice - Consumer Protection Act. Defendant Northwest removed the action to the U.S. District Court for the Southern District of Texas on September 11, 1991, stating that the basis for removal was federal question jurisdiction pursuant to 28 U.S.C. § 1331.[143]

On plaintiffs' motion to remand, defendant Northwest conceded that all causes of action alleged by the plaintiffs in their complaint were based on state law. Nevertheless, Northwest argued that federal jurisdiction was proper because all of the claims related to "rates, routes, or services as an air carrier, and, therefore, [were] preempted under § 1305(a)(1) of the Federal Aviation Act."[144] The U.S. District Court for the Eastern District of Michigan approached the removal petition on two bases: (1) whether plaintiffs'

---

[142] 819 F. Supp. 1352 (E.D. Mich. 1993).

[143] It is unclear from the opinion why the defendants were not able to remove this action based upon diversity of citizenship.

[144] *Burke*, 819 F.Supp at 1354.

claims were preempted under federal law; and (2) whether removal was proper even if the claims were preempted.[145]

In deciding the first issue, the Court acknowledged the recent decision in *Morales v. Trans World Airlines, Inc.*[146] Significantly, the *Morales* decision involved the application of the same Texas statute and regulations upon which the *Burke* claims were based. Those same regulations had been preempted in the *Morales* case, although the *Morales* case involved the application of those state regulations to airfare advertising and not to claims arising from physical injury or death. The federal court also acknowledged other air carrier cases that supported preemption of state law claims, including *Von Anhalt v. Delta Air Lines, Inc.*,[147] which involved preemption of state law claims for negligence, defamation, and assault and battery.

Nevertheless, the court limited the application of *Morales* and these other cases by stating that they involved "direct contact" between the plaintiff and individual "service" employees.[148] The court also quoted from *Margolis v. United Airlines, Inc.*,[149] in which the legislative history underlying the Airline Deregulation Act was examined and quoted with approval. *Margolis* described the scope of preemption as follows:

> Similarly, a state may not interfere with the services that carriers offer in exchange for their rates and fares. For example, liquidated damages for bumping (denial of boarding), segregation of smoking passengers, minimum liability for loss, damages, and delayed baggage, and . . . charges for headsets, alcoholic beverages, entertainment, and excess baggage would clearly be "service" regulation within the meaning of Section 105.
>
> . . . A state common law claim based on negligence and the standard of reasonable care does not purport to regu-

---

[145] *Id.* at 1353.

[146] ___ U.S. ___, 112 S. Ct. 2031 (1992).

[147] 735 F. Supp. 1030 (S.D. Fl. 1990); *see supra* notes 142-43 and accompanying text.

[148] *Burke*, 819 F. Supp. at 1363.

[149] 811 F. Supp. 318 (E.D. Mich. 1993).

> late the services that air carriers provide to their customers in exchange for their fares. The common law of negligence does not hold the airlines to a different standard of care than that provided by the Federal Aviation Act and related regulations. Further, nowhere in the legislative history or in the evolution of the statute is there any suggestion that the preemption provision of the Airline Deregulation Act was intended to preclude common law negligence actions.[150]

The court in *Burke* also acknowledged that detailed and extensive federal regulations regarding training of crews, operations at airports with control towers, and collision avoidance precautions were "all implicated in plaintiffs' three negligence/gross negligence counts."[151] Because plaintiffs did not allege a different standard of care than that set forth in the federal regulations, however, there did not appear to be a conflict between state and federal law. Accordingly, there was no basis for a finding of conflict or issue preemption.[152]

The district court went further, however, to answer the second question of whether removal had been proper, presented assuming that the Federal Aviation Act preempted the plaintiffs' state law claims. The court followed the U.S. Supreme Court's decision in *Metropolitan Life Insurance Co. v. Taylor*,[153] which held that even the existence of an obvious federal defense did not provide a basis for federal removal jurisdiction in abrogation of the "well pleaded complaint" rule traditionally followed in federal removal cases. In following *Metropolitan*, the court concluded that the only federal statutes which had been applied to permit "complete preemption" had been the Labor Management Relations Act and ERISA.[154]

The Court held that "complete preemption" would require a finding not only of federal preemption of the plaintiffs' substantive claims but also an expression of

---

[150] *Burke*, 819 F. Supp. at 1363 (citing 44 Fed. Reg. 9948-49 (1979)).
[151] *Id.*
[152] *Id.*
[153] 481 U.S. 58 (1987).
[154] *Burke*, 819 F. Supp. at 1365-66 (citing 29 U.S.C. §§ 185(A), 1132(f) (1988)).

congressional intent that all such federal claims be subject to removal jurisdiction. The basis for such expression of federal intent in the LMRA and ERISA is that there are separate grants of federal jurisdiction for all claims arising under those laws. While these grants of federal court jurisdiction are not on their face exclusive, such as would be the case in patent, copyright,[155] and admiralty[156] cases, these grants of federal court jurisdiction in combination with federal preemption of state law have been determined to have the *effect* of allowing removal if the defendant chooses to avail itself of the federal subject matter jurisdiction provided under those statutes.

The court found no similar expression of Congressional intent in the Airline Deregulation Act. There being no express grant of federal court jurisdiction in the Airline Deregulation Act, the court held that the "complete preemption" doctrine did not apply and that, even if plaintiffs claims were preempted under the Airline Deregulation Act, there would not be a basis for removal to federal court under the "complete preemption doctrine."[157]

Interestingly, having completed its analysis of the "complete preemption doctrine," the court expressed its dissatisfaction with the doctrine, stating that if an action presented a sufficient "federal question" to support federal jurisdiction in the first instance, then sound jurisdictional policy and the proper application of sections 1331 and 1441 of Title 28 required that the cases be subject to removal.[158] Finally, the court denied defendants' motion for reconsid-

---

[155] 28 U.S.C. § 1338 (1988) ("Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases").

[156] 28 U.S.C. § 1333 (1988). This section provides that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the states of: (1) any civil case of admiralty or maritime jurisdiction."

[157] *Burke*, 819 F. Supp. at 1365.

[158] *Id.* at 1366. While the Court held that federal preemption under the Airline Deregulation Act did *not* apply to this case, in considering removal generally in those cases in which preemption is established, the Court did not consider the possible analogy to removal of cases under the evolving interpretation of the Warsaw Convention. In those cases in which the Warsaw Convention is seen as providing an exclusive federal remedy, federal removal has been permitted, even when plaintiffs' claims are based upon state law and Warsaw is pleaded as a defense.

eration, stating that even if its analysis of the issue of federal preemption is later found incorrect, particularly as related to the claims of false advertising under the Texas Deceptive Practices Act, it was obligated to adhere to the two-step Supreme Court analysis limiting federal removal.[159]

2. Air Carrier Business Practice Claims

The scope of federal preemption of air carrier ticketing, reservation, and boarding practices after the Supreme Court's decision in *Morales v. Trans World Airlines, Inc.*[160] was addressed by the Ninth Circuit Court of Appeals in *West v. Northwest Airlines, Inc.*[161] The Plaintiff in that case initially filed suit for compensation due to denied boarding and overbooking under state law in Montana. Northwest Airlines removed the case to federal court and then moved for summary judgment on the grounds that the plaintiff's state law claims were preempted by subsection 404(b) of the Federal Aviation Act,[162] and that the applicable statute of limitations to such actions under subsection 404(b) had expired. The district court granted summary judgment on both grounds.

The Ninth Circuit Court of Appeals reversed, holding that not all of plaintiff's state law claims for compensatory damages were preempted. In particular, the court held that those claims based on the covenant of good faith and fair dealing under Montana law were not preempted. The court, however, did hold that the practices of overbooking and bumping were accepted industry practices recognized under the Federal Aviation Act, and that punitive damages could not be awarded against Northwest for practices which were permitted under the federal regulations.

Plaintiff and Northwest then petitioned for certiorari to the United States Supreme Court, and the Supreme Court deferred ruling on the petition until after the decision in

---

[159] *Burke*, 819 F. Supp. at 1366-72.
[160] ___ U.S. ___, 112 S. Ct. 2031 (1992).
[161] 995 F.2d 148 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1053 (1994).
[162] 49 U.S.C. app. § 1374(b) (1988).

Morales v. Trans World Airlines.[163] The Supreme Court then granted certiorari on both plaintiff's petition and Northwest's petition and remanded the case to the Ninth Circuit Court of Appeals for further proceedings in light of *Morales.*

The Ninth Circuit court of Appeals effectively entered the same judgment after *Morales* that it had prior to *Morales.* The Ninth Circuit Court of Appeals recognized that the Supreme Court had rejected its earlier analysis, which "distinguished between state laws which 'merely have an effect on airline services' and those involving an 'underlying statute or regulation [which] itself relates to airline services.'"[164] The court recognized that *Morales* rejected such a narrow view of preemption in holding that the words "relating to" in the Airline Deregulation Act are broad and "the words thus express a broad preemptive purpose."[165] Then, despite dissent, the Ninth Circuit seized upon language in the *Morales* opinion that left open the possibility that certain state laws having some effect on airline rates, routes or services would not be preempted, even under the broad reading of the preemption clause. The court stated:

> [W]e do not . . . set out on a road that leads to pre-emption of state laws against gambling and prostitution applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising . . . would similarly 'relat[e] to' rates; the connection would obviously be far more tenuous.[166]

To adapt to this case language from *Shaw,* '[s]ome state actions may affect [airline fares] in too tenuous, remote or peripheral a manner' to have a pre-emptive effect.[167]

The Ninth Circuit held that the effect of the Montana state statute creating a covenant of good faith and fair dealing and a remedy for compensatory damages on airline rates, routes, and services was too tenuous, remote, or pe-

---

[163] *Morales,* 112 S. Ct. 2031 (1992).

[164] *West,* 995 F.2d at 151.

[165] *Id.* (quoting *Morales,* 112 S. Ct. at 2034).

[166] *Id.*

[167] *Id.* (quoting *Morales,* 112 S. Ct. at 2040).

ripheral for application of such statute to be preempted by the Airline Deregulation Act.[168]

The appellate court also recognized that both before and after deregulation, the Civil Aeronautics Board had enacted a regulation which permitted passengers on bumped flights three options: "(1) . . . accept the airline's offer of alternative transportation; (2) . . . accept airline compensation (in the form of money or a voucher for future travel or some combination of the two); or (3) . . . decline the payment and seek to recover damages in a court of law or in some other manner."[169]

The court found that the *Morales* decision provided little guidance as to those matters which were not preempted and concluded that the statute itself also left room for regulatory interpretation of those areas which were preempted.[170] Inasmuch as the regulatory agency itself had recognized that there might be a remedy in a court of law for compensatory damages other than those set forth in the regulation itself, the court concluded that it should defer to the agency's interpretation of the scope of preemption and permit a state law compensatory damages claim. Notably, the court rejected Northwest's argument that any compensatory damage claim must be based on federal law under the Airline Deregulation Act, simply stating that the FAA's regulation allowed a passenger to bring a claim in "court of law" without limiting such claims to actions under federal law or even to actions in federal court.[171]

Significantly, the Ninth Circuit Court of Appeals did not re-address the issue of preemption of punitive damages. However, it reaffirmed that a party could not be held liable for punitive damages for the commission of acts permitted under federal regulations.[172] The argument that punitive damages should be preempted, if compliance with federal

---

[168] *Id.* at 152.

[169] *West*, 995 F.2d at 152 (citing 14 C.F.R. § 250.9(b)(1993)).

[170] *Id.*

[171] *Id.*

[172] *Id.*

regulations is shown, is an argument of possibly broad application in other areas such as those regulated by the Federal Aviation Act. Unlike the Ninth Circuit's limited view in *West v. Northwest Airlines* of federal preemption of airline ticketing, reservation, and boarding practices following *Morales v. Trans World Air Lines, Inc.*,[173] the Seventh Circuit Court of Appeals' decision in *Statland v. American Air Lines, Inc.*[174] applied a broad view of preemption. The *Statland* case presented two issues: (1) whether § 411(b) of the Aviation Deregulation Act[175] created a private cause of action for airline passengers; and (2) whether the Airline Deregulation Act[176] preempted state law causes of action relating to airline ticket refunds. The *Statland* case involved the failure of American Airlines to refund all of the federal tax when retaining a ten per cent ticket cancellation charge. The amount claimed by Mrs. Statland was $1.25. However, she also sought "similar refunds on behalf of thousands of consumers."[177]

The Seventh Circuit Court of Appeals held that section 411(b) does not create a private cause of action.[178] While section 411(b) is intended to regulate consumer practices with regard to airline ticketing, it is not necessary to imply a private cause of action in order to effectuate Congress's intent. In addition, the legislative history of section 411(b) shows that it was intended primarily to transfer the regulatory authority of the Civil Aeronautics Board to the Department of Transportation following airline deregulation.[179] Since the prior CAB regulatory authority did not imply a private cause of action, a private cause of action would not be implied simply by reason of transfer of the CAB's authority to the DOT.

---

[173] ___ U.S. ___, 112 S. Ct. 2031 (1992).

[174] 998 F.2d 539 (7th Cir. 1993).

[175] 49 U.S.C. app. § 1381(b) (1988).

[176] 49 U.S.C. app. § 1305 (1988).

[177] *Statland*, 998 F.2d at 539.

[178] *Id.* at 541.

[179] *Id.*

With respect to state law claims, the Seventh Circuit Court of Appeals broadly interpreted the effect of the preemption provisions of the Airline Deregulation Act[180] as preempting application of any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services in any carrier.

> *Morales v. Trans World Airlines, Inc.*, found that the[se] words express a broad preemptive purpose, and held that Texas guidelines governing air fare advertising were preempted by the Deregulation Act because they related to rates. [The Seventh Circuit Court of Appeals] had also held (before *Morales*) that the Deregulation Act preempted state claims challenging an airline's ticket advertising policies.[181]

Notably, the Illinois state law claims were based on breach of fiduciary duty, violation of the Illinois Consumer Fraud and Deceptive Practices Act, conversion, and breach of contract. The court concluded that it was "obvious that cancelled ticket refunds relate to rates. Under *Morales* and the Airline Deregulation Act states cannot regulate American's ticket refund practices either by common law or by statute. This sweeps aside *Statland's* state law claims."[182]

As seen by the Ninth Circuit decision in *West v. Northwest Airlines, Inc.*,[183] the Montana statutory covenant of good faith was held not to have been preempted on the grounds that it would have too tenuous an impact on the regulation of rates, routes, or services.[184] The Ninth Circuit based its decision on the fact that the pre- and post-regulation CAB and DOT regulations had preserved a common law cause of action for "bumping."[185] *Statland v. American Airlines, Inc.* involved only airline practices with regard to refunds on cancelled tickets. Nevertheless, from the standpoint of conceptual consistency, *Statland* validates the dissent's argument in *West*, namely that in an area where Congress has

---

[180] 49 U.S.C. app. § 1305 (1988).
[181] *Statland*, 998 F.2d at 541 (citations omitted).
[182] *Id.* at 542.
[183] 995 F.2d 148 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1053 (1994).
[184] *Id.* at 151.
[185] *Id.* at 151-52.

established preemption, a federal agency cannot lawfully authorize state regulation.[186] In other words, if the only difference in *West* and *Statland* is that there are federal regulations in *West* which purportedly permit state law claims for "bumping," then it would seem that the federal regulations, and not the argument that one regulation "relates to rates, routes or services" and the other has "tenuous" relationship, are the basis for these inconsistent results between the Seventh and Ninth Circuit Courts of Appeals with regard to express preemption by the Airline Deregulation Act.[187]

3. Air Carrier Employment Practice Claims

The issue of federal preemption of state laws relating to employment practices involving discrimination against persons "because of a handicap" was addressed by the Colorado Court of Appeals in *Belgard v. United Airlines.*[188] In that case, a challenge was made to a United Airlines' restriction against employment of pilots who had "undergone surgery that was designed to alleviate the effects of myopia."[189] Plaintiffs contended that United's policy violated certain regulations promulgated by the Colorado Civil Rights Commission. Complicating the case was the fact that a pre-ADA § 1305 implied preemption challenge to action by the Colorado Anti-Discrimination Commission had been unsuccessful in the U.S. Supreme Court in *Colorado Anti-Discrimination Commission v. Continental Airlines Co.*[190]

The Colorado Court of Appeals determined that it was necessary to evaluate the issue of preemption from the

---

[186] *Id.* at 153 (Brunetti, J., dissenting).

[187] Of course, the opposite is possible. For example, if Congress has not expressly preempted an area, but has authorized a federal agency to enact regulations, then under the doctrine of implied preemption, the federal regulations may establish preemption. But, arguably, according to the dissent in *West*, where Congress has expressly stated its intent to preempt a particular area or field, then federal regulations cannot grant the states the right to regulate that area. Of course, if Congressional intent is unclear, as may be the case here, federal regulations may be given deference by the courts in defining the scope of preemption.

[188] 857 P.2d 467 (Colo. Ct. App. 1992), *cert. denied*, 114 S. Ct. 1066 (1994).

[189] *Id.* at 468.

[190] 372 U.S. 714 (1963).

standpoint of express and implied preemption. The Colorado appellate court noted that § 1305 of the Airline Deregulation Act,[191] "specifically prohibits the enforcement of any state law 'relating to' the 'services' of an air carrier."[192] By analogy to *Shaw v. Delta Air Lines, Inc.*,[193] which involved similar "relat[ion] to" language in the Employee Retirement Income Security Act of 1974 (ERISA),[194] the Colorado Court of Appeals held that Congress had intended to expressly preempt any conflicting state regulations.[195]

The court then went on to review the recent decision in *Morales v. Trans World Airlines*,[196] which gave a broad interpretation to the express preemption provisions of the Airline Deregulation Act. The court concluded that there were few factors more important in determining the nature of services that an airline is to provide than the quality of its flight crews.[197] The court cited *French v. Pan Am Express, Inc.*[198] and *World Airways, Inc. v. International Brotherhood of Teamsters*[199] Finally, the court distinguished the prior decision in *Colorado Anti-Discrimination Commission v. Continental Airlines, Inc.* by characterizing that decision as involving a state regulation against racial discrimination which could not conflict with the prior federal law, because the converse of the state regulation, "i.e., a requirement to engage in racial discrimination, could not be validly enforced in any state."[200]

In *Belgard*, if the state regulations were enforced, the states might be free to regulate the employment of persons having a physical handicap and even to define the very concept of a "handicap" in a variety of ways, leaving airlines

---

[191] 49 U.S.C. app. § 1305 (1988).

[192] *Belgard*, 857 P.2d at 470.

[193] 463 U.S. 85 (1983).

[194] 29 U.S.C. § 1001 (1988).

[195] *Belgard*, 875 P.2d at 470.

[196] ___ U.S. ___, 112 S. Ct. 2031 (1992).

[197] *Belgard*, 857 P.2d at 470.

[198] 869 F.2d 1 (1st Cir. 1989) (holding that state drug testing was preempted).

[199] 578 F.2d 800 (9th Cir. 1978) (concluding that reinstatement under the Railway Labor Act was preempted by the Airline Deregulation Act).

[200] *Belgard*, 857 P.2d at 471.

subject to a multiplicity of varying regulations on employment of flight personnel. Such a result led the court to comment that even in the absence of express preemption, the apparent predominant federal interest and the need for uniformity preclude such state regulation.[201]

Belgard clearly demonstrates the comprehensive regulation of air transportation and Congress's intent to assure uniform regulation. However, these observations are not appropriately made in areas in which implied preemption would exist either because Congress has chosen to regulate those particular areas or aspects of air transportation or because of the predominant federal interest, rather than by the expansion of express preemption through the extension of the *Morales* decision. The difficulty with such a further extension of *Morales* is that, while the federal preemption statute may be interpreted as providing a very broad express preemptive requirement, there are many areas in which federal law simply may not provide a rule of decision or remedy. Instead, implied preemption limiting the doctrine to those areas in which Congress has chosen to regulate air transportation or in which national uniformity is clearly required.[202]

In *Anderson v. American Airlines, Inc.*[203] the Fifth Circuit Court of Appeals addressed the issue of federal removal under the doctrine of complete preemption as applied to a state retaliatory discharge claim under Texas law. Plaintiff Anderson alleged that he had been the subject of a retaliatory discharge for filing a Workers' Compensation claim in violation of Tex. Rev. Civ. Stat. Ann. art. 8307c. American sought removal to federal court on the grounds that plaintiff's state law retaliatory discharge claim was completely

---

[201] *Id.* at 470 (citing Hillsborough County v. Automated Medical Lab., Inc., 471 U.S. 707 (1985); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, (1947)). *Cf.* Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, (1963); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, (1959).

[202] *Cf.* Levy v. American Airlines, Inc., No. 90-Civ.-7005 (LJF), 1993 U.S. Dist. LEXIS 7842 (S.D.N.Y. June 9, 1993).

[203] 2 F.3d 590 (5th Cir. 1993).

preempted either by the Railway Labor Act[204] or by the Airline Deregulation Act.[205]

The Fifth Circuit Court of Appeals held that the Texas retaliatory discharge claim did not require an interpretation of the collective bargaining agreement with defendant American Airlines.[206] The mere fact that American could refer to the collective bargaining agreement to "support the credibility of its claims" that it did not discharge Anderson in retaliation for filing a Workers' Compensation claim made it unnecessary to require an *interpretation* of the collective bargaining agreement.[207] Accordingly, plaintiff's claims did not invoke the preemptive scope of the Railway Labor Act.

The court also considered the issue of complete preemption under § 1305 of the Airline Deregulation Act. The court noted that the Supreme Court in *Morales* had defined the scope of express preemption under § 1305 very broadly. Nevertheless, the Fifth Circuit Court of Appeals also stated that the Supreme Court cautioned that the pre-emptive sweep of § 1305(a)(1) was not infinite: "[S]ome state actions may affect [airline fares] in too tenuous, remote or peripheral a manner to have a pre-emptive effect."[208]

The Fifth Circuit Court of Appeals held that a claim for money damages under the Texas Civil Workers' Compensation Act for retaliatory discharge was "far too remote to trigger preemption."[209] The Fifth Circuit also stated that it need not consider whether the Federal Aviation Act would preempt the availability of reinstatement under the same provision of the Texas Civil Workers' Compensation Act.[210] The court held that, even if reinstatement were preempted,

---

[204] 45 U.S.C. §§ 151(a), 184 (1988).

[205] 49 U.S.C. app. § 1305 (1988).

[206] *Anderson*, 2 F.3d at 596.

[207] *Id.*

[208] *Id.*

[209] *Id.* at 597.

[210] *Id.*

it would not necessarily conclude that the Federal Aviation Act completely preempted a claim for money damages.[211]

Finally, the court in *Anderson* stated that the complete preemption doctrine was limited to cases in which there was "a clearly manifest Congressional intent to make state claims removable to federal court."[212] In so stating, the court had previously noted that removal based on the presence of a federal defense usually is improper; however, under the doctrine of "complete preemption"

> a federal statute is occasionally "so 'extraordinary' that it 'converts an ordinary state common law complaint into one stating a federal claim.'"
> Once an area of state law has been completely preempted, any claim purportedly based on that preemptive state law is considered, from its inception, a federal claim, and, therefore, arises under federal law.[213]

The court held that Congress did not clearly intend that § 1305 of the Airline Deregulation Act should make claims such as the Texas Workers' Compensation claim involved in this case removable to federal court.[214]

4. *Implied Preemption of Air Carrier Claims*

The case which presents a primer on federal preemption, the Warsaw Convention, and the Airline Deregulation Act is *Levy v. American Airlines, Inc.*[215] The *Levy* case managed to implicate virtually all of these issues. *Levy* resulted from attempts by Federal Drug Enforcement Administration agents to extradite Mr. Levy from Egypt to the United States on drug-related charges. Mr. Levy contended that his extradition from Egypt to the United States was improper in that Egyptian authorities had been misled as to the criminal charges against him. Nevertheless, he was

---

[211] *Anderson*, 2 F.3d at 597-98.

[212] *Id.* at 598 (citing Beers v. North American Van Lines, Inc., 836 F.2d 910, 913 n.3. (5th Cir. 1988)).

[213] *Id.* at 594 (quoting Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987) and Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987)).

[214] *Id.* at 598.

[215] No. 90-Civ-7005 (LJF), 1993 U.S. Dist. LEXIS 7842 (S.D.N.Y. June 9, 1993).

turned over by Egyptian authorities to two U.S. DEA agents, Grabowski and Oberti. He was handcuffed and placed on board a Swissair flight from Cairo to Zurich. His handcuffs were released during the takeoff in response to information from the flight attendant that safety regulations required that he not be handcuffed for the takeoff. After eating a meal, he was permitted to go to the restroom where he was permitted privacy in the restroom but the door was kept ajar so that the agents could observe his actions. While in the restroom, Levy attempted "to cut his wrists with the pull-tab from a soda can."[216]

As the old adage goes, "that's when the trouble started." Levy was forcibly pulled from the lavatory and forced to the floor of the adjacent galley. Levy fought with the agents who found it necessary to restrain him on the floor and place a towel in his mouth to stop him from screaming to other passengers that he was being kidnapped by the agents.

According to Levy, he had merely asked the agents to show him the extradition papers as he was being restrained on the floor and the agents' response was to hit him several times in the face and to try to choke him with a towel. Nevertheless, according to a witness on board the aircraft, Levy was on the floor, screaming that he was being kidnapped, and trying to bite the agents who were restraining him.

Because of his screams, the agents asked a flight attendant if there was anything that could be used to stop him from screaming and the flight attendant provided a towel which was placed over his mouth. Because of the self-inflicted wound, the officers also asked the flight attendant to attempt to locate a doctor. Luckily, Dr. Jusela, who was on board the flight, came to the officers' assistance. An in-flight medical kit was located and Dr. Jusela gave Levy two or three injections of Valium.

After the sedative took effect, Levy remained on the floor of the galley for the remainder of the flight to Zurich.

---

[216] *Id.*

Upon arrival in Zurich, the Swiss police took Levy to a holding cell.

Later that day, the agents retrieved Levy and attempted to place him on an American Airlines flight to New York. The captain of the American Airlines flight examined the identification of the DEA agents but did not ask to see the extradition papers. An attempt was then made to place Levy on board the aircraft. He was rolled onto the aircraft on a stretcher while being restrained with a restraining jacket, a jacket over his head and tape over his mouth. The other passengers had already boarded the aircraft, and in response to their complaints and concerns that this man might have been a terrorist or otherwise dangerous, the captain demanded that Levy be removed from the aircraft.

After a request for further assistance, a deputy U.S. Marshall Oboyski arrived in Zurich several days later to transport Levy to New York. This time Levy was placed on the American Airlines flight prior to any of the other passengers boarding the airplane. Levy was restrained with his mouth taped throughout the flight from Zurich to New York. He received no food or drink and was not permitted to leave his seat to go to the bathroom. At one point in the flight, Levy indicated to Oboyski that his hands hurt and Oboyski loosened his restraints. The flight was otherwise uneventful. Upon arrival in New York, Levy was examined prior to being placed in the Metropolitan Correction Center. At that time, his medical complaints were examined and, other than an injury to his left wrist, a cut on his right wrist, and a possible dislocation of the small finger on his right hand, no other medical problems were identified. X-rays were taken and the X-rays indicated that the only injury evidenced was an old, healed fracture of the fifth finger of Levy's right hand.

Now, before proceeding any further, the reader may wish to perform the following test. There may be more than one correct answer, so circle all of the answers believed to be applicable:

1. Levy has claims as a result of this incident which may be asserted against the following:

____ a. United States Government
____ b. Egyptian Government
____ c. Swissair
____ d. American Airlines
____ e. the DEA agents
____ f. the deputy U. S. Marshall
____ g. others (list in the space provided)

_____
_____
_____

2. The claims which Levy might assert include the following:

____ a. alienation of affections
____ b. false imprisonment
____ c. failure to provide safe passage
____ d. assault and battery
____ e. kidnapping
____ f. failure to provide proper medical supervision and treatment
____ g. negligently releasing Levy to federal agents
____ h. failure to protect Levy from the federal agents
____ i. others

3. These claims are cognizable or limited by the following:

____ a. New York state law
____ b. the Airline Deregulation Act
____ c. Warsaw Convention
____ d. Federal Aviation Regulations
____ e. Tokyo Convention

If you answered each of the foregoing questions by omitting only claims against the United States and the Egyptian governments and the somewhat spurious reference to alienation of affections, you have accurately described the lawsuit which Levy filed and the basis upon of which the

Southern District of New York granted summary judgment to all defendants.[217]

First, with respect to the Warsaw Convention,[218] the court held that Levy's claims against American and Swissair, while they involved international air transportation, were not "accidents" as defined under the Warsaw Convention.[219] Specifically, the court held that while the actions of other passengers may, under certain circumstances, give rise to an "accident" under Warsaw, such accidents and injuries must be "external to the passenger."[220] In this case, Levy's own admitted conduct in attempting to cut his wrists with the pop tab gave rise to the federal agents' actions. Therefore, their conduct was not "an unexpected or unusual event or happening that [was] external to the passenger."[221] The court distinguished other cases involving terrorist acts, hijackings, and drunken passengers which did not involve conduct on the part of the injured passenger.

The next issue under the Warsaw Convention, however, was the defense raised by American Airlines that the Warsaw Convention provided the exclusive remedy and preempted state law claims arising out of international air transportation. The court noted that the U. S. Supreme Court in *Eastern Airlines, Inc. v. Floyd*[222] reserved ruling on the exclusivity of the Warsaw Convention in cases in which no remedy was provided under Warsaw. The court concluded that the Warsaw Convention was not the exclusive remedy for accidents arising out of international air transportation, but that in those cases in which it did not provide a remedy, state law remedies were preserved.[223] The court specifically referred to the statement in *In Re Lockerbie, Scot-*

---

[217] *Levy*, 1993 U.S. Dist. LEXIS 7842 at *1.

[218] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T. S. No. 876 (1934).

[219] *Levy*, 1993 U.S. Dist. LEXIS 7842 at *11-13.

[220] *Id.*

[221] *Id.* at *11 (citing Air France v. Saks, 470 U.S. 392, 405 (1985)).

[222] Eastern Airlines, Inc. v. Floyd, 499 U.S. 530 (1991).

[223] *Levy*, 1993 U.S. Dist. LEXIS 7842 at *15.

land[224] that a plaintiff "plainly may institute" a state law cause of action when his or her claim does not arise under the Warsaw Convention.[225]

Next, under the Tokyo Convention,[226] airline crew members, passengers, and others were granted immunity to the extent that they were involved in restraining any person necessary "(a) to protect the safety of the aircraft or persons or property therein; or (b) to maintain good order and discipline on board."[227] On the basis of the Tokyo Convention, the court held that the claims of false imprisonment and assault and battery against Swissair were subject to summary judgment.[228] The court did not, however, grant summary judgment with respect to those claims which involved the *failure* of Swissair *to take* certain *action*, such as failing to provide Levy with safe passage, failing to provide proper medical supervision and treatment, and negligently releasing him to agents.[229]

Instead, as to those issues, the court addressed the extent of any common law duty of common carriers to provide safe passage, adequate medical care and proper release of the passenger to the DEA agents. The court stated that the duty to provide safe passage competes with the airline's obligation to protect other passengers and not to interfere with law enforcement officials.[230] As such, the court concluded that, even accepting the facts most favorably to Levy, which included accepting that the agents hit him, broke his fingers, and choked him, given Levy's admitted extreme behavior, some force was necessary to restrain him and pro-

---

[224] 928 F.2d 1267 (2d Cir. 1991), *cert. denied sub. nom.*, Rein v. Pan Am World Airways, Inc., 112 S. Ct. 331 (1991).

[225] *Levy*, 1993 U.S. Dist. LEXIS 7842 at *15 (quoting *In re Air Disaster at Lockerbie Scotland*, 928 F.2d at 1267).

[226] Convention Relating to Offenses and Certain Other Acts Committed On Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941.

[227] *Levy*, 1993 U.S. Dist. LEXIS 7842 at *17.

[228] *Id.* at *26.

[229] *Id.*

[230] *Id.* at *25.

tect both him and the other passengers.[231] The court stated the following:

> Under the circumstances - where the alleged excessive force occurred for a very brief period, where Levy was clearly disturbed and dangerous, and where crew members faced potential criminal liability if they did interfere - no reasonable jury could find that the Swissair crew violated a duty to Levy by not interfering with or questioning the agents' conduct.[232]

Accordingly, the District Court granted summary judgment on these state law common carrier claims against Swissair.[233]

As to the state law claims against American Airlines, which also involved transportation to the United States, the issue of preemption of the state law claims under the Airline Deregulation Act also was presented. The U.S. District Court for the Southern District of New York rejected broad express preemption under § 1305 of the Airline Deregulation Act and the decision in *Morales v. Trans World Airlines.*[234] Instead, the Southern District of New York followed the exception in *Morales* by concluding that any state laws implicated in Levy's allegations were too "'tenuous, remote or peripheral'" to be related to airline rates, routes or services.[235] The court interpreted the broad "relating to" language set forth in the statute and the *Morales* decision as preempting state law "only when that law is *directly* related to airlines, not when its effect on the airline industry is merely incidental."[236]

Nevertheless, the court went on to consider implied preemption. The court first determined that Congress had not fully developed the law in the area of airline travel, and,

---

[231] *Id.* at *28.

[232] *Levy*, 1993 U.S. Dist. LEXIS 7842 at *29.

[233] *Id.*

[234] ____U.S.____, 112 S. Ct. 2031 (1992).

[235] *Levy*, 1993 U.S. Dist. LEXIS 7842 at *231 (citing *Morales*, 112 S. Ct. at 2040).

[236] *Id.* (citing New York v. Pan Am World Airways, 728 F. Supp. 162, 176 (S.D.N.Y. 1989) (overly broad interpretation of § 1305(a)(1) could doom all state regulations affecting airlines)).

therefore, the existence of federal regulations per se did not establish implied preemption of Levy's state law claims.[237] In so doing, the court specifically relied upon the savings clause, which stated that "nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."[238]

Despite the savings clause, the court considered the possibility of preemption by conflict with specific regulations and noted that the federal regulations provide that "high risk passengers must remain under the control of at least two armed law enforcement escorts at all times while on board an airplane."[239] Additionally, the court noted that federal law makes it a crime to "oppose an extradition agent of the United States in the execution of his duties."[240] Accordingly, the Southern District of New York noted that under these federal regulations and statutes "American was not only prohibited from interfering with the agents, [but] its employees could have been criminally liable if they attempted to do so."[241] Under these circumstances, the court concluded that all of the common law claims against American Airlines for allegedly failing to provide him with safe passage, falsely imprisoning him, and failing to provide him medical supervision and treatment would have interfered with the DEA agents' custody of him and conflicted with federal law. Therefore, they were preempted.[242]

Finally, with respect to the claims against Swissair for failing to provide medical care and releasing Levy to the DEA agents in Zurich, which both involved only travel outside the United States and were not preempted by the U.S. statute, the court noted that Levy had been provided medical care in the person of Dr. Jousela who provided him with

---

[237] *Id.* at *24.

[238] *Id.* (citing 49 U.S.C. § 1506 (1988)).

[239] *Levy*, 1993 U.S. Dist. LEXIS 7842 at *25 (citing 14 C.F.R. § 108.1(a) (1988)).

[240] *Id.* at *26 n.12 (citing 18 U.S.C. § 1502 (1988)).

[241] *Id.* at *26.

[242] *Id.*

immediate medical attention on board the flight.[243] Additionally, an ambulance was available upon the flight's arrival in Zurich, and Levy was handed over to Swiss police. Therefore, Swissair had satisfied its obligations.[244]

In addition to presenting an interesting factual scenario, the *Levy* case demonstrates again the limitations in the federal cases applying express preemption under § 1305 of the Airline Deregulation Act and *Morales v. Trans World Airlines. Levy* also demonstrates the proper use of conflict preemption in those cases not subject to express preemption, but in which federal regulations specifically authorize and impose certain duties which conflict with the state law claims. Whether the Warsaw Convention provides an exclusive remedy against air carriers for international air transportation, and therefore precludes claims in circumstances to which it does not apply, is another issue which seems to be the source of continued conflict among the federal courts.

III. WARSAW CONVENTION AND AIR CARRIER LIABILITY

A. Warsaw Jurisdiction, Preemption and Removal

Lathigra v. British Airways[245] involved federal preemption of state law claims by the Warsaw Convention. The case also involved the liability of a connecting carrier under the Warsaw Convention. The case arose as a result of a discontinued flight on Air Mauritius, which had been scheduled and ticketed by British Airways in the United States. The case initially was filed by the plaintiffs in state court, but removed to federal court on the basis of the Warsaw Convention. The defendant also moved for summary judgment on the grounds that the three year statute of limitations under the Warsaw Convention barred the claim.

The court first found it necessary to evaluate the definition of "carrier" under the Warsaw Convention. The court

---

[243] *Id.* at *29.
[244] *Levy*, 1993 U.S. Dist. LEXIS 7842 at *31.
[245] 24 Av. Cas. (CCH) 17,343 (W.D. Wash. 1993).

noted that persons other than the airlines providing carriage could have liability as "carriers" under the Convention if they were acting as agents of the air carrier.[246] The court noted several cases which involved non-employees who were providing security or skycap services. However, the court refused to apply the definition of "carrier" so narrowly as to apply only to agents of that type and held that the Convention applies to any agent who has furthered the contract of carriage or performed services the airline otherwise would be required by law to perform.[247] Relying upon the decision of *In re Air Crash Disaster at Gander, Newfoundland*,[248] the court noted that "the framers of the Warsaw Convention intended to include all those concerned with the enterprise of air carrier's international air travel within the scope of the Convention."[249] The court stated that "[e]ven under the narrowest of these definitions,"[250] British Airways comes into the definition of carrier. "[A]n entity which makes reservations for a carrier and which confirms flights, acts in furtherance of the contract of carriage - no less, at any rate, than does a baggage handler or a security agent."[251]

The court noted that other cases which had unsuccessfully attempted to hold booking agents liable as carriers under the Warsaw Convention were cases involving personal injuries due to aircraft highjacking and the "*plaintiffs' injuries* . . . were in no sense connected to the agency relationship."[252] In this case, the discontinued flight was directly related to the agency relationship. Based upon its determination that plaintiff's claims were preempted by the Warsaw Convention, the court held that the claims were

---

[246] *Id.* at 17,346.

[247] *Id.*

[248] 660 F. Supp. 1202 (W.D. Ky. 1987).

[249] *Lathigra*, 24 Av. Cas. (CCH) at 17,345 (quoting *In re Air Crash Disaster at Gander, Newfoundland*, 660 F. Supp. at 1220)).

[250] *Id.*

[251] *Id.*

[252] *Id.* at 17,346.

barred by the shorter statute of limitations under the Warsaw Convention.[253]

In *Jack v. Trans World Airlines, Inc.*,[254] the court was presented with the issue of federal court removal of five lawsuits resulting from the destruction of TWA Flight 843 departing New York's John F. Kennedy Airport for San Francisco on July 30, 1992. Five of the passengers filed suit in San Francisco Superior Court, relying exclusively on state law theories of recovery. Defendant TWA removed to federal court under the Warsaw Convention the three cases in which the plaintiffs held tickets for international flights.[255]

The U.S. District Court for the Northern District of California was called upon to decide the question of "complete preemption" and removal of state court actions under the Warsaw Convention. Based upon a detailed review of the Warsaw Convention, the court concluded that the drafters of the Convention intended it to be the exclusive basis for recovery of damages arising from personal injury and death during international flights.[256] Accordingly, the court held that the Warsaw Convention preempts state law causes of action, not just remedies, and that TWA's removal of the actions was proper.[257] The court recognized the substantial uncertainty as to the propriety of removal based on the Warsaw Convention, and, therefore, the case was certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).[258]

B. Practice and Procedure Under Warsaw Convention

1. Notice of Liability Limitations

In *Keally v. Compania Mexicana de Aviacion*,[259] the issue of notice of the liability limitations to international passengers

---

[253] *Id.*

[254] 820 F. Supp. 1218 (N.D. Cal. 1993).

[255] *Id.* at 1226.

[256] *Id.*

[257] *Id.*

[258] *Id.*; *see also Lathigra*, 24 Av. Cas. (CCH) at 17,343 (granting Warsaw Convention removal).

[259] 24 Av. Cas. (CCH) 17,384 (S.D. Tex. 1993).

under the Warsaw Convention was addressed. The issue was not whether the ticket included the limitation, but whether the passenger even received a ticket as opposed to simply having received a boarding pass. Possession of the ticket was established by Mexicana's possession of the flight coupons for the roundtrip flight between Dallas - Ft. Worth and Cancun. Apparently, the passenger's original ticket was not accounted for, and at the time the passengers arrived at the DFW airport for their departure to Cancun, they had not yet received their airline ticket booklets. Nevertheless, the airline procedure of returning the airline flight ticket booklet to the passenger after removing the flight coupon, as well as the markings indicated on the flight coupon which showed that it had been accepted for travel and marked at the time the passenger received her seat assignment and boarding pass, established that the ticket itself had been in the possession of the passenger and had been returned to the passenger on the flight from Dallas to Cancun. The return ticket coupon also had been removed from the same booklet in Cancun three days later for the return flight. The court concluded that this evidence, as well as all reasonable inferences to be drawn therefrom, supported a finding of fact that the passenger had possession of the airline ticket booklet containing the limitations of liability prior to departing from Dallas to Cancun.[260] Accordingly, the liability limitations of $75,000.00 under the Montreal protocol were enforceable in that case.[261]

2. *Jury Trial*

The availability of a jury trial for wrongful death claims arising out of international air transportation over the high seas was the subject of *Stevens v. Korean Air Lines.*[262] The U. S. District Court for the Southern District of New York came to the same conclusion in this decision which other district

---

[260] *Id.*

[261] *Id.*

[262] 814 F. Supp. 599 (S.D.N.Y. 1993).

courts had reached following the liability trial in the *Korean Air Lines*[263] case and the remand of the damages cases to the courts in which they were originally filed. Korean Air Lines had filed a motion to strike the demand for jury trial, contending that the applicable law of the United States was the Death on the High Seas Act[264] and that the Death on the High Seas Act did not include a right to a jury trial. Based upon the Second Circuit decision in *Lockerbie*,[265] the court concluded that the Warsaw Convention[266] provided a separate remedy, apart from the Death on the High Seas Act, which was governed by federal common law.[267] The district court also reviewed the maritime cases, including *Moragne v. States Marine Lines, Inc.*,[268] and concluded that the U. S. Supreme Court had recognized that a wrongful death action was recognized under the federal common law, particularly in maritime causes.[269] The court declined to extend the limitations of the Death on the High Seas Act to aviation accidents, particularly in view of the ratification of the Warsaw Convention after the Death on the High Seas Act.[270] The court concluded that, in the interest of uniformity, the right to jury trial would not be based upon whether the accident occurred outside the territorial waters of the United States (DOSHA), but held that any action governed by the federal common law of wrongful death, as applied under Warsaw, was merely the enforcement of a common law right "enforceable in an action for damages in the ordinary courts of law."[271] Accordingly, plaintiff was entitled to a jury trial.

---

[263] *Id.* at 600 (describing and citing the history of the KAL KE 007 litigation resulting in the Second Circuit Court of Appeals affirming a jury finding of willful misconduct and reversing an award of punitive damages).

[264] 46 U.S.C. app. §§ 761-68 (1988).

[265] *In re* Air Disaster at Lockerbie, Scotland, 928 F.2d 1267 (2d. Cir.), *cert. denied*, 112 S. Ct. 331 (1991) [hereinafter *Lockerbie I*].

[266] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T. S. No. 876 (1934).

[267] *Stevens*, 814 F. Supp. at 601.

[268] 398 U.S. 375 (1970).

[269] *Stevens*, 814 F. Supp. at 602-03.

[270] *Id.* at 602.

[271] *Id.* at 604.

In *Park v. Korean Air Lines Co.*,[272] the district court also held that, in federal common law wrongful death actions under Warsaw established by the *Lockerbie I* decision, plaintiffs were entitled to a jury trial.[273] The court noted that the issue seemed to have been presented again by Korean Air Lines primarily for purposes of preserving it on appeal. Nevertheless, the court stated that, if the issue was being presented for substantive determination, then the court was still of the view that the plaintiffs were entitled to jury trial under the Warsaw Convention.[274]

In *Bowden v. Korean Airlines*,[275] six of the Korean Air Lines cases involving Michigan residents were transferred to the Eastern District of Michigan for trial on the issue of damages. The District Court denied Korean Air Lines' motion to strike the jury demand on the grounds that the objections to the transferee court's prior rulings on the availability of a jury trial had not been appealed, further and on the grounds that the right to a jury trial was the law of the case.[276] The court also concluded that the "respective rights" of plaintiffs under Article 17 of the Warsaw Convention[277] included the rights made available under national law, which included the right to a jury trial.[278] The court rejected the argument that the Death on the High Seas Act[279] precluded a jury trial in Warsaw cases involving accidents over the high seas because such a conclusion would defeat the objective of uniformity between air crash cases over land and those over the high seas.[280]

---

[272] No. 83-Civ-7900 (PNL), 1992 U.S. Dist. LEXIS 16841 (S.D.N.Y. Oct. 29, 1992).

[273] *Id.* at *5-6.

[274] *Id.*

[275] 814 F. Supp. 592 (E.D. Mich. 1993).

[276] *Id.* at 595.

[277] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T. S. No. 876 (1934).

[278] *Bowden*, 814 F. Supp. at 597.

[279] 46 U.S.C. app. §§ 761-68 (1988).

[280] *Bowden*, 814 F. Supp. at 597.

C. Occurrences and Injuries Within Scope of Convention

In *Gezzi v. British Airways*[281] the Ninth Circuit Court of Appeals held that a passenger who slipped and fell on a puddle of water on steps boarding the airplane had sustained an "accident" which was both "unexpected and unusual" and external to the passenger.[282] Accordingly, the court held that the passenger was entitled to compensation under Article 17 of the Warsaw Convention,[283] which provides that "an air carrier is liable for bodily injury suffered by a passenger 'if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.'"[284] The Ninth Circuit Court of Appeals rejected the defendant's argument that the case was controlled by *Price v. British Airways*,[285] which held that injuries sustained in a fistfight did not result from a "accident" because the fight had no relationship to the operation of the aircraft.[286]

The application of the Warsaw Convention to survival and wrongful death claims arising from exposure to a terrorist attack were considered in *Sakaria v. Trans World Airlines*.[287] In *Sakaria*, plaintiff's decedent had been a passenger on board a TWA flight from New York to Athens, Greece. The flight was scheduled to stop in Rome, Italy, but, upon approaching Rome, the crew was informed that a terrorist attack had taken place and that the airport was closed. Due to insufficient fuel to continue to another destination, the Boeing 747 landed at the airport in Rome, but was held in a secure area away from the location of the terrorist attack. The passengers were confined in the aircraft for approximately one and one-half hours until a waiting

---

[281] 991 F.2d 603 (9th Cir. 1993).

[282] *Id.* at 605.

[283] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T. S. No. 876 (1934).

[284] *Gezzi*, 991 F.2d at 604.

[285] No. 91-Civ-4947 (JFK), 1992 U.S. Dist. LEXIS 9581 (S.D.N.Y. 1992).

[286] *Gezzi*, 991 F.2d at 603-04.

[287] 8 F.3d 164 (4th Cir. 1993).

area was prepared for them in the terminal away from the location of the terrorist attack. While there was evidence that it might have been possible for certain passengers to leave the secured terminal area if they had not been stopped by the guards, there was no evidence from any of the other passengers on the flight that anyone actually did so.

Upon his late arrival in Athens, plaintiff's decedent excitedly related the events surrounding the terrorist attack to members of his family. Included in his recollection of the events were reports of being held in the stifling heat aboard the aircraft and of having seen bodies when he went upstairs to go to the washroom in the terminal. According to family members, Mr. Sakaria refused to eat, remained upset, and broke out in tears several times while describing his experience in Rome. That evening he retired early, and the next morning he was found dead in his bed, having suffered a heart attack.

The original complaint in this action asserted state law survival and wrongful death claims based upon (1) a breach of contract with Sakaria to fly from New York to Athens nonstop, and (2) negligence due to the failure to have sufficient fuel on board the flight to avoid landing in Rome after the terrorist attack. TWA denied any negligence and also raised the Warsaw Convention, as modified by the Montreal Agreement,[288] as an affirmative defense limiting its liability.

After discovery, TWA sought summary judgment on all claims. The only expert testimony supporting the assertion that Mr. Sakaria's heart attack had been due to any of the events associated with his TWA flight to Athens was that of a cardiologist who testified that confinement in the aircraft for one and one-half hours before being exposed to "graphic evidence of the carnage caused by the terrorist at-

---

[288] Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, May 13, 1966, *reprinted in* CIVIL AERONAUTICS BOARD, AERONAUTICAL STATUTES AND RELATED MATERIAL 515-16 (1974).

tack,"[289] could probably have provoked Mr. Sakaria's heart attack. When presented on cross-examination with a scenario in which Mr. Sakaria neither saw the aftermath of the attack nor was exposed to a stifling environment on the plane, the cardiologist renounced that conclusion.[290]

Both the magistrate and the district court had failed to consider whether plaintiffs were entitled to relief under the Warsaw Convention.[291] As stated by the Fourth Circuit Court of Appeals, it is now without question that the Warsaw Convention creates an independent cause of action which is basically a strict, but limited, liability cause of action.[292] Under the Warsaw Convention, the two issues to be decided were whether an injury was caused by an "accident" and whether the accident occurred during the course of the flight or during embarking or disembarking from the aircraft.[293]

The Fourth Circuit Court of Appeals held that the only basis for any conclusion that Mr. Sakaria had witnessed any carnage were his own reports after he arrived in Athens.[294] TWA had obtained medical information indicating that Mr. Sakaria suffered from hallucinations and confabulations.[295] Indeed, Sakaria's wife had indicated that, upon watching events involving the Iran-Iraq war, Sakaria had become excited and imagined that he was threatened by those events, even though in New York. Based upon this evidence, the Fourth Circuit Court of Appeals held that even if Sakaria's reports in Athens could be considered contemporaneous reports which otherwise might be entitled to admissibility under the "excited utterance" doctrine, the fact that Sakaria was subject to hallucinations and confabulations un-

---

[289] *Sakaria*, 8 F.3d at 167 n.2.

[290] *Id.*

[291] *Id.* at 168.

[292] *Id.* at 170.

[293] *Id.* at 168-69.

[294] *Sakaria*, 8 F.3d at 171-72.

[295] *Id.* at 167, n.6. "'Confabulations' are the 'recitation of imaginary experiences to fill gaps in memory.' It was described by one expert as 'generating or reporting nonexistent situations, either totally nonexistent or mixed with real events.'" *Id.* (Citation omitted).

dermined the spontaneous credibility of any such reports.[296] Therefore, Sakaria's reports were not admissible under the "excited utterance" doctrine.[297] Once the evidence of having been exposed to carnage was eliminated, the court concluded that there was no basis to find any causation between any of the actual (as opposed to imagined) events on the TWA flight from New York to Athens and that summary judgment was therefore, proper under the Warsaw Convention.[298]

The court then stated that if the Warsaw Convention was not applicable, the next issue would be whether any state law claims for negligence were preserved.[299] The court noted that while in *In re Air Disaster at Lockerbie, Scotland*,[300] the Second Circuit held the Warsaw remedy, where applicable, is exclusive of any others, the Supreme Court has reserved decision on whether the scope of exclusivity precludes other state law claims if the Warsaw Convention does not provide a remedy.[301] Without deciding that issue, however, the Fourth Circuit Court of Appeals noted that any state law claims would also fail for lack of proximate cause.[302] Furthermore, the Fourth Circuit Court of Appeals noted that any negligence in failing to sufficiently fuel the plane in New York to allow the plane to be flown nonstop to Athens would not provide a basis for establishing foreseeability in the possible causation between the Rome layover events and Sakaria's death.[303]

Finally, any contract claims also were barred under the doctrine of *Hadley v. Baxendale*.[304] The court also noted that in cases involving wrongful death many states do not permit

---

[296] *Id.* at 171-72.

[297] *Id.*

[298] *Sakaria*, 8 F.3d at 169.

[299] *Id.* at 173.

[300] 928 F.2d 1267 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991) [hereinafter *Lockerbie I*].

[301] *Sakaria*, 8 F.3d at 173.

[302] *Id.*

[303] *Id.*

[304] 9 Ex. 341, 156 Eng. Rep. 145 (1854).

such actions to be based upon contract.[305] Therefore, any wrongful death actions would be barred for that reason as well.[306] The Fourth Circuit Court of Appeals affirmed summary judgment in favor of Defendant Trans World Airlines on all of plaintiffs' claims.[307]

D. Damages Recoverable under Convention

1. Korean Air Lines KE 007 Decisions

In *Park v. Korean Air Lines Co., Ltd.*,[308] the court considered the issues of wrongful death damages, survival damages, and also the claim of a Korean cause of action for mental anguish and grief on the part of the survivors. Korean Air Lines argued in this case, as it had in other cases,[309] that the sole source of applicable law was the Death on the High Seas Act.[310] The district court disagreed, emphasizing again that the *Lockerbie*[311] decision stated that the Warsaw Convention was to be applied and interpreted under federal common law principles.[312] Nevertheless, the district court concluded that maritime law, in particular the Death on the High Seas Act, was the primary guide where deaths occur on the high seas.[313] Pursuant to the Death on the High Seas Act, the court concluded that only pecuniary losses could be recovered and that there would be no recovery for loss of society or the related claim of loss of consortium.[314]

This decision conflicts with *Stevens* which looked to maritime law and concluded that damages for loss of society or loss of consortium are recoverable in maritime cases.[315]

---

[305] *Sakaria*, 8 F.3d at 173.
[306] *Id.*
[307] *Id.*
[308] No. 83-Civ-7900 (PNL), 1992 U.S. Dist. LEXIS 16841 (S.D.N.Y. 1992).
[309] *In re* Korean Airlines Disaster of Sept. 1, 1983, 814 F. Supp. 599 (S.D.N.Y. 1993).
[310] 46 U.S.C. app. §§ 761-68 (1988).
[311] 928 F.2d 1267 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991).
[312] *Park*, 1992 U.S. Dist. LEXIS 16841 at *13-15.
[313] *Id.* at *21.
[314] *Id.* at *22.
[315] 814 F. Supp. 599 (S.D.N.Y. 1993).

The decision also conflicts with decisions such as *In re Korean Air Lines Disaster of September 1, 1983*,[316] *Zarif v. Korean Air Lines*[317] and *Bowden v. Korean Air Lines, Inc.*[318] which looked to the Warsaw Convention itself and the definition of injuries to the person to conclude that any person who could claim an injury, either pecuniary or due to loss of care, comfort or society, was entitled to a recovery under the Warsaw Convention.

The district court in *Park* nevertheless rejected the argument that a survival action was not available because such an action is not provided under the Death on the High Seas Act.[319] The district court reiterated that the Death on the High Seas Act was not an exclusive remedy and that general maritime law was unsettled as to the availability of a survival action.[320] In order to determine that issue, however, the court decided to look to other federal statutes and state law statutes to determine the recoverability of pre-death pain and suffering in a survival action. The court concluded that the vast majority of federal statutes had been construed to provide such an action, and state laws also generally provided such a recovery.[321] Accordingly, the court further concluded that the federal common law to be applied under Warsaw required the availability of a survival action for pre-death pain and suffering.[322]

Finally, plaintiff argued for the application of Section 4 of the Death on the High Seas Act which recognizes the availability of foreign causes of action. The district court pointed out that the *Lockerbie I*[323] decision had emphasized the importance of achieving uniformity in air crash disaster litigation.[324] The court also concluded that if federal stat-

---

[316] 807 F. Supp. 1073 (S.D.N.Y. 1992).
[317] 836 F. Supp. 1340 (E.D. Mich. 1993).
[318] 814 F. Supp. 592 (E.D. Mich. 1993).
[319] *Park*, 1992 U.S. Dist. LEXIS 16841 at *25.
[320] *Id.*
[321] *Id.* at *23-25.
[322] *Id.* at *25.
[323] 928 F.2d at 1267.
[324] *Park*, 1992 U.S. Dist. LEXIS 16841 at *28.

utes such as DOHSA which provided for the applicability of the law of a foreign state in the event of a death by wrongful act were to be applied under the Warsaw Convention, then the goal of achieving uniformity under the Warsaw Convention would be defeated.[325] In the case of a conflict between the Warsaw Convention and federal statute, the treaty would supersede the provisions of the statute and govern the availability of a survivor's recovery.[326] Accordingly, the district court ruled that any recovery under a Korean cause of action for recovery of damages for mental grief and anguish, as applied under DOHSA, would be inconsistent with the Warsaw Convention and not permitted.[327]

The recent release by the Russian Federation government of the cockpit voice recorder (CVR) and digital flight data recorder (DFDR) tapes from the Korean Air Lines Flight KE 007 accident provided the evidence upon which the U.S. District Court for the Eastern District of Michigan in *Zarif v. Korean Air Lines Co., Ltd.*[328] concluded that the passengers had suffered conscious pain and suffering following a missile strike which caused the aircraft to go out of control.[329] Specifically, the CVR and flight data recorder provided the basis for an ICAO report which the court found concluded that "the plane had flown for at least nine minutes in a descending spiral, was lost from radar contact at 5,000 meters, . . . and was destroyed upon impact with sea."[330] This report, along with the testimony of an eyewitness who saw a large explosion and the fact that the wreckage was located within an area of approximately 60 by 160 meters broad and 174 meters deep, caused the federal district court to conclude in this non-jury case that the aircraft had not broken up in flight, as contended by Korean Air

---

[325] *Id.*

[326] *Id.* at *31.

[327] *Id.*

[328] 836 F. Supp. 1340 (E.D. Mich. 1993).

[329] *Id.* at 1349.

[330] *Id.* at 1346 (characterizing ICAO report).

Lines, but had remained intact until the time of final impact.[331]

The court also analyzed the conflicting medical testimony as to the likelihood that the passengers would have donned their emergency oxygen masks and, therefore, had been conscious during the final nine minutes after the missile strike and prior to impact with the ocean. Korean Air Lines contended that the oxygen masks probably would not have dropped down quickly enough for the passengers to have donned the masks. Once the masks extended, the effect of air through the unpressurized cabin would have caused the masks to "kite" above the passengers' heads making them unaccessible during the 15 to 18 seconds of consciousness at high altitude during which the passengers might have placed the masks on their faces.[332] Finally, Korean Air Lines' expert also testified that, during that period of consciousness, the lack of oxygen would have caused the passengers to have experienced euphoria and a lack of muscular coordination.[333] However, based upon Korean Air Lines' expert's prior testimony and writings, the flight surgeon's manual, the ICAO report, and the testimony of other expert witnesses, the court concluded that Korean Air Lines' expert's testimony was incredible.[334]

Instead, the court concluded the following:

> It appears to the Court that the passengers, who had already likely been awakened by the breakfast and landing announcement, most certainly heard the missiles strike, heard the explosive sounds of decompression, heard the pressure alarm, and had ample time to don their masks (between 20 and 35 seconds). They were aware of the plane zooming to 38,250 feet, out of control, and of the rapid descent (with limited control and forces up to twice that of gravity), of the rolls which culminated in the Dutch roll, and spirals, and of at least the entire nine minutes during which they were tracked down to 15,000 feet on radar. The final spiral and

---

[331] *Id.* at 1346.
[332] *Id.* at 1349.
[333] *Zarif*, 836 F. Supp. at 1349.
[334] *Id.* at 1346-47.

> explosion into the sea followed. The fearfulness and pain of the experience need not, and cannot, be described.[335]

Based on the foregoing findings of fact, the court awarded $1,000,000 to the Estate of Mrs. Zarif for pre-impact conscious pain and suffering.[336] The court held that damages for loss of economic support to the plaintiff would have been a recoverable element of damages, but found no evidence to support such an award in this case.[337] Similarly, the court also was willing to consider an award of damages for mental anguish if accompanied by physical manifestations, but concluded that there was no medical evidence to support a finding of such physical manifestations.[338] Inasmuch as plaintiff was an adult, the court did not award damages for loss of nurture because there was no evidence the adult child either was dependent upon or had reasonable grounds for expecting any pecuniary benefit from a continuance of decedent's life.[339] The court also rejected an award of damages for loss of services since there was no evidence to support such an award.[340] Nevertheless, the court awarded the plaintiff damages for the loss of care, comfort and society of his mother in the amount of $500,000.[341]

In *Bowden v. Korean Air Lines*,[342] the U.S. District Court for the Eastern District of Michigan also followed *Korean Air Lines II*[343] in denying the motions to apply DOHSA limitations to pecuniary losses. The court noted that the Warsaw Convention permitted recovery of *dommage materiel* and *dommage moral*, or moral and nonpecuniary damages. The District Court held that such *dommage moral* included damages for pre-impact pain and suffering, to the extent such suffering had resulted in physical injury as required by *Eastern*

---

[335] *Id.* at 1349.
[336] *Id.*
[337] *Id.* at 1350.
[338] *Zarif*, 836 F. Supp. at 1351.
[339] *Id.* at 1349-50.
[340] *Id.* at 1351.
[341] *Id.*
[342] 814 F. Supp. 592 (E.D. Mich. 1993).
[343] 807 F. Supp. 1073 (S.D.N.Y. 1992).

Airlines Inc. v. Floyd.[344] The court also held that it would not permit recovery of hedonic damages for the loss of quality of life because such damages normally did not survive the victim in cases other than civil rights cases.[345] Nor would the court permit recovery of decedent's future lost wages because the court would permit the survivors to claim loss of support, loss of society, lost inheritance, lost services and love and affection.[346] The court held that a recovery of future lost wages would result, in part, in a double recovery.[347]

The recoverability of pre-judgment interest to the mother and sister of one of the victims of the KAL 007 tragedy was determined in *Zicherman v. Korean Air Lines Co., Ltd.*[348] The U.S. District Court for the Southern District of New York reviewed the history of the KAL 007 litigation and concluded that the award of pre-judgment interest was proper in that case because the Warsaw Convention limitation had been lifted as a result of the jury's finding of willful misconduct.[349] The court distinguished the prior decision in *O'Rourke v. Eastern Air Lines, Inc.*,[350] in which the court had held that the award of prejudgment interest in a Warsaw case would not be permitted because the framers of the Warsaw Convention did not intend for compensation to exceed $75,000.00.[351] In cases in which willful misconduct eliminated the $75,000.00 cap, however, the court concluded that the reason for denying pre-judgment interest also was eliminated.[352] The court in *Zicherman* then analyzed the recoverability of pre-judgment interest under federal law. The court concluded that the result of the Second Circuit opinion in *Lockerbie I*[353] was that the Warsaw Convention created a federal cause of action and must be con-

---

[344] 499 U.S. 530 (1991).
[345] *Bowden*, 814 F. Supp. at 599.
[346] *Id.*
[347] *Id.*
[348] 814 F. Supp. 605 (S.D.N.Y. 1993).
[349] *Id.* at 607.
[350] 730 F.2d 842 (2d Cir. 1984).
[351] *Zicherman*, 814 F. Supp. at 607.
[352] *Id.*
[353] *In re* Air Disaster at Lockerbie, Scotland, 950 F.2d at 839.

strued exclusively under the federal common law.[354] Under federal law, "in the absence of an applicable federal statute, it is for federal courts to determine, according to their own criteria, the appropriate measure of damage expressed in terms of interest for non-payment of the amount found to be due."[355] The court concluded that the purpose of pre-judgment interest is compensatory and, since the object of the Warsaw Convention also was compensation, pre-judgment interest was consistent with the Warsaw Convention.[356] Similarly, the court found that pre-judgment interest normally is awarded in admiralty, DOSHA and civil rights cases, and also under various federal statutes.[357] Accordingly, the court concluded that the federal common law as it pertains to damages available under Warsaw would permit the recovery of pre-judgment interest in the event of a finding of willful misconduct.[358]

2. Cargo and Passenger Baggage - Warsaw

The issue of whether the Warsaw Convention and its presumption of liability extend to surface transportation associated with a shipment by air was addressed in *General Electric Co. v. Harper Robinson & Co.*[359] A jet engine, transported on an Air France flight, was being transported by a trucking company outside of the airport when it was damaged. In response to General Electric's claims against Air France, the court concluded that the Warsaw Convention applied only to the period of transportation by air which extends only to the airport's border.[360] Further, General Electric had made its own arrangements for ground transportation and failed to notify the air carrier of the claim within the time required by the tariff. The court, therefore, also granted summary judgment to the air carrier on the grounds that timely

---

354 *Zicherman*, 814 F. Supp. at 607-608.
355 *Id.* at 608 (quoting West Va. v. United States, 479 U.S. 305 (1987)).
356 *Id.* at 611.
357 *Id.* at 609-610.
358 *Id.* at 611.
359 818 F. Supp. 31 (E.D.N.Y. 1993).
360 *Id.* at 34.

notice had not been given as required under the tariff.[361] If the air carrier had itself arranged for the surface transportation, then notice to the surface carrier might have been sufficient notice to the air carrier. General Electric itself made the arrangements with the surface carrier, and, therefore, notice to the surface carrier was not effective notice to the air carrier.

The application of a tariff limitation prohibiting the shipment of certain types of goods in a Warsaw Convention case was the issue presented in *Williams Dental Co. v. Air Express International.*[362] Plaintiff Williams Dental Company had contracted with Air Express International to ship a package containing dental supplies, including fifty ounces of gold, from New York to Sweden. Williams Dental Company declared a total value of $23,474.50 and had paid a higher rate for shipment due to the higher declared value. Williams Dental Company also had identified the goods by the Schedule B Commodity Number which refers to a type of gold. The Schedule B Commodity Number is a "universal number used by all freight companies and any transportation company."[363] Upon arrival in Sweden, the 50 ounces of gold were missing from the shipment.

Plaintiff filed suit to recover the full declared value of $23,474.50 in the U.S. District Court for the Southern District of New York under the Warsaw Convention. Air Express International defended, contending that its tariff prohibited the shipment of gold, and, in view of the limitation in the tariff, its total liability would be limited to $9.07 per pound under Article 22 of the Warsaw Convention.

The district court granted summary judgment to Plaintiff Williams Dental Company, Inc. on the grounds that the undisputed evidence showed that Williams Dental Company had declared a higher value.[364] Under the Warsaw Convention, the carrier would be liable for the full declared value

---

[361] *Id.*

[362] 824 F. Supp. 435 (S.D.N.Y. 1993).

[363] *Id.* at 440.

[364] *Id.* at 439-40.

of the goods since Williams Dental Company had declared a higher value.[365] The court reviewed many of the Warsaw Convention cases, including *Orlov v. Philippine Air Lines, Inc.*,[366] and *Trans World Airlines, Inc. v. Franklin Mint Corp.*[367] In these cases, the Supreme Court had enforced the Warsaw liability limitation, but also had noted that "had such a declaration been made, and an additional fee paid, the shipper would have been able to recover in an amount not exceeding the declared value."[368]

The District Court rejected the argument that the plaintiff was on notice of the tariff because such tariffs no longer are required to be filed by the Civil Aeronautic Board.[369] Moreover, any such tariff limitation would be unenforceable unless it met the requirements for enforceability under the Warsaw Convention.[370] The court reasoned that the Warsaw Convention precluded any provision "tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this [C]onvention."[371] Since the plaintiff satisfied the requirements of the Convention by declaring a higher value, any provision tending to limit the carrier's liability must meet the requirements of Article 23 of the Warsaw Convention.[372] The court set forth the following requirements:

> In general, a liability limitation is enforceable if (1) it resulted from a fair, open, just and reasonable agreement between the carrier and shipper entered into by the shipper for the purposes of obtaining the lower of two or more shipping rates proportioned to the amount of the risk, and (2) the shipper was given the option of additional recovery upon paying a greater rate. In determining whether these requirements for enforceability have been met, courts have considered such factors as (1) whether the carrier has given

---

[365] *Id.*
[366] 257 F.2d 384 (2d Cir. 1958).
[367] 466 U.S. 243 (1984).
[368] *Williams*, 824 F. Supp. at 439 (quoting *Trans World Airlines*, 466 U.S. at 246 n.2).
[369] *Id.* at 439-40.
[370] *Id.* at 441.
[371] *Id.* (citing 49 U.S.C. § 1502 (1988)).
[372] *Id.* at 441-43.

> adequate notice of the limitation of its liability to the shipper, (2) the economic stature and commercial sophistication of the parties, (3) the availability of "spot" insurance to cover a shipper's exposure. The reasonableness of notice is a question of law to be determined by the court. Although defendant does not seek to limit its liability to an amount lower than that specified by the Warsaw Convention, defendant does seek to limit its liability through its tariff to an amount below the "full actual damages" specified in an air waybill valid under the Warsaw Convention. Therefore, to the extent the defendant's tariff tends to "relieve the carrier of liability" under Article 23, that limitation of liability is not enforceable, because there is no evidence that the defendant, a commercially sophisticated carrier, gave plaintiff adequate notice of the tariff.[373]

The court reacted very strongly to the carrier's acceptance of the goods at the higher declared rate, charging an increased shipping rate, and then attempting to limit liability to that which would be established by the minimum Warsaw Convention limitation simply because the tariff prohibited acceptance of the shipment. The court summarized the shipper's obligation under these circumstances as follows:

> In sum, there is no genuine issue of fact that plaintiff told defendant the shipment contained one pail and two boxes of dental supplies worth almost $25,000, and supplied the Schedule B [Commodity] [N]umber for gold. Defendant accepted an additional rate to ship the package, based on its additional declared value. Thus, plaintiff provided information sufficient to notify defendant that the shipment contained gold. It was then up to defendant, a commercially sophisticated carrier, either to enforce its own tariff or to assume the additional risk associated with the increased shipping rate. In other words, because plaintiff declared that the shipment was worth far more than the Warsaw Convention limitation of $9.07 per pound, provided enough information to indicate the shipment contained an item prohibited by defendant's tariff, and has not been shown to

---

[373] *Williams Dental Co.*, 824 F. Supp. at 441 (citations omitted).

> have been actually aware that the tariff prohibited the shipment, defendant is liable notwithstanding the existence of the tariff.[374]

Finally, the court rejected Air Express International's attempt to limit the recovery to $1,262.93, which apparently was the proportionate value of the total declared value based upon the relative weight of the fifty ounces of gold to the total weight of the shipment.[375] Instead, the court concluded that the value of the gold was $407.40 per ounce on the date of the shipment.[376] The court concluded that the value of the pail obviously was not equal to the value of the gold, and limiting the recovery to the proportionate weight would mean that

> a shipper who ships an expensive but lightweight item in an inexpensive but heavy container (or with other inexpensive but heavy items) may not recover the value of the expensive items unless the entire shipment is lost; alternatively, if the expensive item is lost, the shipper may recover only a fraction of the item's declared value.[377]

The court noted that Air Express's argument was not supported by any case law under the Warsaw Convention and that the Warsaw Convention "is a simple, 'bright-line' liability rule for lost international shipments: if the shipper declares an additional value for a shipment and pays an additional shipping charge, the carrier is liable for the value if the shipment is lost."[378]

The Second Circuit Court of Appeals in *Maritime Insurance Co. Ltd. v. Emery Air Freight Corp.*[379] upheld a strict construction of Articles VIII and IX of the Warsaw Convention, which require that the air waybill contain all of the particulars set out in Articles VIII (a) to (i) inclusive, and (q), - in order for a carrier to be entitled to limit its liability under

---

[374] *Id.* at 442.

[375] *Id.*

[376] *Id.*

[377] *Id.* at 443.

[378] *Williams*, 824 F. Supp. at 443.

[379] 983 F.2d 437 (2d Cir. 1993).

the Warsaw Convention.[380] It was undisputed that Items (a), (c), and (e) were omitted, but Emery Air Freight argued that under the decision in *Exim Industries v. Pan Am World Airways*,[381] any such omissions must be commercially significant or prejudicial. The Second Circuit limited its prior holding in *Exim Industries* only to subsections (h) and (i), and stated that all other particulars must be included in order for the carrier to avail itself of the limitation on liability.[382] Accordingly, the Second Circuit Court of Appeals held that Emery was not entitled to avail itself with the limitations of liability under the Warsaw Convention and further stated that any cases in the Second Circuit holding to the contrary were overruled.[383]

E. Air Carrier Liability

1. Liability - General

The liability of a national or international trunk airline for injuries or death to a passenger carried by a related commuter airline was debated in *Shaw v. Delta Airlines, Inc.*[384] Indeed, the impression created in the minds of members of the public as to whether national or international trunk airlines and commuter airlines are "related" and how that relationship may be perceived was precisely the issue which precluded summary judgment in *Shaw v. Delta Airlines, Inc.* In that case, plaintiff suffered serious personal injuries in a crash on January 15, 1990, aboard Skywest Flight 5855 from Salt Lake City, Utah, to Elko, Nevada. Delta moved for summary judgment on the grounds that it had no liability for any torts committed by Skywest. Delta relied, in part, upon several Warsaw Convention cases which held that connecting carriers are not liable for personal injuries or death under the Warsaw Convention.[385]

---

[380] *Id.*
[381] 754 F.2d 106 (2d Cir. 1985).
[382] *Maritime Ins. Co.*, 983 F.2d at 440-41.
[383] *Id.* at 441.
[384] 798 F. Supp. 1453 (D. Nev. 1992).
[385] *Id.* at 1458 n.6.

Delta also cited another case that rejected a liability claim against a ticketing agent for injuries or death.[386]

After a detailed analysis of the relationship between Delta Airlines and Skywest, the court held that issues[387] of fact were presented to the jury on the theory of actual or apparent agency. The court rejected plaintiff's argument that Delta and Skywest were partners or joint venturers.[388] The court indicated, however, that there might be a principal-agency relationship and that the jury would have to determine the scope of such relationship. Moreover, even if no actual agency existed, an apparent agency might be found if the plaintiff was successful in establishing that the joint Skywest and Delta marketing strategy created the impression in the minds of the travelling public that the two airlines were "equated." The court stated that:

> Plaintiffs also present evidence that tends to show that Delta's actions have effectively managed to equate Skywest with Delta in the minds of the travelling public. Delta published the Skywest information in Delta timetables and refers to Skywest's service as the "Delta Connection." The two names (Delta and Skywest) appear together in national advertising materials along with the same trademark the "Delta Connection". The agreement between Delta and Skywest provides for the use of Delta slogans and insignia "to reflect the Delta Connection and the *relationship* between Skywest and Delta." Advertising materials depict the Delta trademark (a red, white and blue triangle) close to the Skywest name and Delta includes Skywest destination cities in its own list of Delta destinations. Delta issues Skywest tickets on Delta ticket stock and provides Delta ticket stock to Skywest for some of their ticketing needs.[389]

The court went on to state that the issue before it was similar to those presented in cases involving franchisors and franchisees. Referring to one such case, the court noted

---

[386] *Id.* (citing Stanford v. Kuwait Airlines Corp., 648 F. Supp. 1158 (S.D.N.Y. 1986)).

[387] *Id.* at 1457.

[388] *Id.* at 1456.

[389] *Shaw*, 798 F. Supp. at 1458 (emphasis added).

that the test was whether the franchisor "strictly controlled the manner in which the franchisee was perceived by the public, creating an appearance of ownership and control purposely designed to attract the patronage of the public."[390] Noting that franchisor/franchisee cases were neither controlling nor completely analogous,[391] the court recognized that they "do accurately portray the issues that the trier of fact will face in an apparent authority case such as this one."[392]

Those familiar with the airline industry, in particular the origin and growth of commuter carriers and their relationship with the trunk airlines, may believe it is obvious that they are independent businesses. However, the question of whether the appearance of "ownership and control purposely designed to attract the patronage of the public" has now been created appears to be closely related to the extent of joint advertising, marketing, scheduling, and the use of trademarks and in some cases similar trade dress, such as aircraft paint schemes.

In *Stanford v. Kuwait Airways Corporation*[393] the issue of potential liability to non-passengers for breach of negligent security screening was presented. The court rejected the motion of Middle Eastern Airways (MEA) for summary judgment based upon the claim that Middle Eastern Airways did not have a duty of care owed to non-passengers or passengers of connecting interline flights. Adhering to Restatement (Second) of Torts, section 324a, the court held that an airline which undertakes as a part of the International Air Transport Association (IATA) to provide security services may be liable if the failure to exercise reasonable care in providing these services increases the risk of harm or is relied on by other air carriers as a part of the security screening system.[394] Additionally, the court rejected MEA's

---

[390] *Id.*

[391] *Id.* at 1459.

[392] *Id.*

[393] 24 Av. Cas. (CCH) 17202 (S.D.N.Y. Oct. 6, 1992).

[394] 24 Av. Cas. (CCH) at 17205.

argument that the negligence of the connecting airline was the sole proximate cause of the damages.[395] The court stated than "an actor whose negligence has set a dangerous force in motion is not safe from liability for harm it has caused innocent persons solely because another had negligently failed to take action that would have avoided this."[396] Instead, it was "reasonably foreseeable that the consequences complained of would follow from the allegedly wrongful act."[397]

2. *Damages*

In *Bea v. Aerolineas Argentinas*[398] the court entered a summary judgment in favor of the defendant airline in a claim arising from its issuance of a ticket to the plaintiff for a date on which the airline did not have a scheduled flight. The plaintiff claimed that the defendant had breached a contractual obligation and that the breach had resulted in consequential damages noted in the amount of $43,705. The court noted that the ticket itself specifically stated that the times shown on the ticket were not guaranteed and formed no part of the contract and that the schedules were subject to change without notice.[399] Moreover, the court found that the ticket also disclaimed any consequential damages.[400] The court held that the consequential damages sustained by plaintiff were not foreseeable in contract under the rule of *Hadley v. Baxendale*,[401] and that summary judgment on this contract claim should be entered in favor of the defendant.[402]

---

[395] *Id.*

[396] *Id.* at 17,205 (quoting Petition of Kinsman Transit Co., 338 F.2d 708, 719 (2d Cir. 1964) (rejecting the "last clear chance" doctrine), *cert. denied*, 380 U.S. 944 (1965)).

[397] 24 Av. Cas. (CCH) at 17,205 (quoting Bernstein v. Crazy Eddie, Inc., 702 F. Supp. 962 (E.D.N.Y. 1988), *vacated in part, In Re* Crazy Eddie Sec. Lit., 714 F. Supp. 1285 (E.D.N.Y. 1989)).

[398] 24 Av. Cas. (CCH) 17,415 (N.Y. Sup. Ct. 1993).

[399] *Id.* at 17,416.

[400] *Id.*

[401] 9 Ex. 341, 156 Eng. Rep. 145 (1854).

[402] *Bea*, 24 Av. Cas. (CCH) at 17,416.

3. Cargo and Passenger Baggage

In *Hill Construction Corp. v. American Air Lines, Inc.*,[403] a non-Warsaw Convention case, the issue of enforcement of the limitation on liability set forth in the air way bill was presented, notwithstanding the obvious negligence of the air carrier in damaging the goods. The court held that the limitations on liability contained in American's air waybill were enforceable.[404] The limitations set forth on the reverse side stated that American's liability for cargo "lost, damaged, or delayed" was "limited to $9.07 per pound (plus transportation charges) unless the shipper declared a higher value and paid an additional charge."[405] Although the district court had found that American was negligent in the handling of plaintiff's cargo, the First Circuit Court of Appeals held that the limitation on liability was nevertheless enforceable because the shipper had not declared a higher value for the goods.[406]

In this case, a helicopter blade had been delivered to American Airlines in Puerto Rico for shipment to California. The helicopter blade then was lost by American Airlines, and subsequently, American discovered a container which it believed contained the helicopter blade. A representative of Hill Construction was called and asked to inspect the package. Upon locating the package, American's employees proceeded (over Hill's objection) to open the package with a forklift. Once the package was opened, the helicopter blade, damaged by the forklift, was found enclosed.

The particular facts of this case caused the First Circuit Court of Appeals to consider two possible deviations from the cases enforcing a tariff or waybill limitation on liability. The court first considered whether the Ninth Circuit decision in *Coughlin v. Trans World Air Lines, Inc.*,[407] involving

---

[403] 996 F.2d 1315 (1st Cir. 1993).
[404] *Id.* at 1318-19.
[405] *Id.* at 1316.
[406] *Id.* at 1318, 1320.
[407] 847 F.2d 1432 (9th Cir. 1988).

an air lines' increased liability for losing the ashes of a passenger's deceased husband, was applicable. The court held that the *Coughlin* case should be limited to its facts, in which a separate special promise was breached by the airline by refusing to allow the passenger to carry the ashes into the cabin, and then losing the ashes.[408] According to the First Circuit Court of Appeals, the breach of this separate contract was not subject to the limitation on liability.[409]

Hill also raised the "deviation doctrine," which originated in maritime law. Under the "deviation doctrine," if there is a deviation in the method of carriage which fundamentally changes the foreseeable risks to the cargo, then the limitation on liability may not be enforced.[410] In both of the cases cited by *Hill*, there were separate promises made as to either the specific route over which the goods would be transported or the precise manner in which the goods would be transported. The court stated that these cases involved subsequent agreements, which superseded the provisions of the air waybill, and refused to follow the state court decisions in those cases.[411]

Finally, the court concluded that there might be authority in one Ninth Circuit decision for lifting the limitation on liability in cases involving willful misconduct.[412] Of course, this was not a Warsaw Convention case in which willful misconduct would have lifted the Warsaw limitations on liability. Nevertheless, the court concluded that there was not evidence of willful misconduct in this case, and the trial court's conclusion that the limitation on liability was inapplicable was reversed.[413]

---

[408] *Hill Constr. Corp.*, 996 F.2d at 1318-19.
[409] *Id.* at 1319.
[410] *Id.*
[411] *Id.* at 1319-20.
[412] *Id.* at 1320.
[413] *Hill Constr. Corp.*, 996 F.2d at 1320.

4. Miscellaneous

In *United States v. Hicks*,[414] a First Amendment challenge was made to 49 U.S.C. § 1472(j) which makes it a criminal offense for a passenger to "assault, intimidate, or threaten . . . so as to interfere" with a crew member's duties.[415] In *Hicks*, certain passengers on an aircraft had repeatedly used angry, profane and defiant language in response to multiple requests by the aircraft's personnel not to operate electronic equipment aboard the aircraft so as to interfere with the navigational equipment and/or annoy other passengers. The court rejected the plaintiff's First Amendment challenges, holding that the statute was constitutional under the "time, place and manner" cases involving limitations on protected speech.[416] However, the Fifth Circuit also rejected the government's argument that profane speech was *ipso facto* not protected by the Constitution.[417] The Court noted that such language was protected by the Constitution, but that the regulation of such speech was justified in view of the unique circumstances and the need to provide for the safety of all passengers during a commercial airline flight.[418]

The court noted that the facts in that case indicated both cockpit crew members and cabin crew members were taken away from their normal duties as a result of the disruption caused by the defendants.[419] The court further held that the intent required under the statute was only a general intent to intimidate and that there was no requirement of any specific intent to interfere with the operation of the aircraft.[420] Finally, there was evidence that the electronic equipment had, in fact, caused a navigational malfunction during the take-off.

---

[414] 980 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1618 (1993).
[415] *Id.* at 968.
[416] *Id.* at 971.
[417] *Id.*
[418] *Id.*
[419] *Hicks*, 980 F.2d at 972.
[420] *Id.* at 972.

Hicks was sentenced to 14 months' imprisonment to be followed by three years of supervised release. Moore was sentenced to eight months' imprisonment, to be followed by three years of supervised release. A bystander passenger who engaged in the disruption was sentenced to four months' imprisonment, to be followed by three years of supervised release. Each was required to pay restitution in the amount of $1,871.35 to Continental.

The Federal Aviation Administration's regulations pertaining to enhanced security, promulgated pursuant to the Aviation Security Improvement Act of 1990[421] were reviewed by the U. S. Court of Appeals for the D.C. Circuit in *Public Citizen, Inc. v. FAA.*[422] Public Citizen objected because the notices of proposed rule making did not set forth in sufficient detail the security staffing, training, and measures which were to be implemented pursuant to the Act. Public Citizen insisted: (1) that the regulations themselves, which set forth certain minimum staffing and training requirements, were inadequate as they did not set forth the specific number of screeners or the details of the training program other than to state that each air carrier must have its own air carrier security program; (2) all persons involved in screening must be qualified pursuant to the program; and (3) that if they fail the test, they must take remedial training before being permitted to take the test again.

Public Citizen also complained that the specific rules pertaining to air carrier security systems should have been made available under the Freedom of Information Act[423] and the Administrative Procedure Act.[424] Public Citizen argued that even though the Federal Aviation Act had been amended to preclude disclosure of such information under the Freedom of Information Act when "in the interest of aviation safety," such limitation was not sufficiently extensive to preclude disclosure under the Administrative Proce-

---

[421] 49 U.S.C. app. § 1357(h)(1988 & Supp. II 1990).
[422] 988 F.2d 186 (D.C. Cir. 1993).
[423] 5 U.S.C. § 552 (1988).
[424] 5 U.S.C. § 553 (1988).

dure Act. The U.S. Court of Appeals for the D.C. Circuit responded by stating that the Federal Aviation Act was sufficiently definite to unmistakably indicate Congress's intent that, even if such information was subject to disclosure under the Freedom of Information Act, it certainly was not available under other provisions of federal law.[425]

Finally, Public Citizen objected to the FAA's determination that nondisclosure of such information was in the interest of aviation safety. Public Citizen produced an affidavit from the previous director of aviation security for the FAA which stated that the FAA should only be concerned about disclosure if its rules were inadequate. If the rules were adequate, then there would be no harm in disclosure. Sensibly, the D.C. Circuit rejected this argument, stating that providing this information to potential terrorists would possibly assist them in avoiding airport security systems because no security system is perfect.[426] The D.C. Circuit, therefore, affirmed the FAA's determination as not being arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[427] The D.C. Circuit also noted that, in interpreting the Federal Aviation Act, the proper method of interpreting the act was to apply the unmistakable intent of Congress, and, if the intent was not clear, then great deference would be given to the Federal Aviation Administration's own interpretation of the statute.[428]

IV. PRODUCTS LIABILITY

A. STATUTE OF REPOSE

The most significant recent development in aviation products liability law is the enactment of the General Aviation Revitalization Act of 1994.[429] On August 17, 1994, President Clinton signed into law a federal statute of repose

---

[425] *Public Citizen*, 988 F.2d at 194-96.
[426] *Id.* at 197.
[427] *Id.* at 197-98.
[428] *Id.* at 196-97.
[429] Pub. L. No. 103-298, 108 Stat. 1552 (1994).

applicable to personal injury, wrongful death or property damage claims against general aviation manufacturers and arising "out of an accident involving a general aviation aircraft."[430] The statute of repose was the result of the continued efforts of certain key senators and representatives, including Representative Dan Glickman and Senator Nancy Kassebaum of Kansas, but ultimately was supported by nearly every member of the U.S. Senate and passed on a voice vote by a clear majority of the House of Representatives.[431]

The federal statute of repose applies generally to product liability actions arising from accidents which occur eighteen (18) years following the date of first delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or from the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft.[432] For new and replacement parts, the

---

[430] *Id.* § 2(a).

[431] The vote in the Senate was 91-8 in favor of the legislation.

[432] The text of the federal statute of repose is as follows:

Section 1. Short Title.

This act may be cited as the General Aviation Revitalization Act of 1994.

Section 2. Time Limitations on Civil Actions Against Aircraft Manufacturers.

(a) In General. — Except as provided in subsection (b), no civil action for damages for death or injury to persons or damage to property arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft or the manufacturer of any new component, system, subassembly, or other part of the aircraft, in its capacity as a manufacturer if the accident occurred—

(1) after the applicable limitation period beginning on—

(A) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or

(B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft; or

(2) with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft, and which is alleged to have caused such death, injury or damage, after the applicable limitation period beginning on the date of completion of the replacement or addition.

(b) Exceptions. — Subsection (a) does not apply—

(1) if the claimant pleads with specificity the facts necessary to prove, and proves, that the manufacturer with respect to a type certificate or

statute of repose applies generally to actions arising from accidents eighteen (18) years after the replacement or the addition of the part.[433]

---

airworthiness certificate for, or obligations with respect to continuing airworthiness of, an aircraft or a component, system, subassembly, or other part of an aircraft knowingly misrepresented to the Federal Aviation Administration, or concealed or withheld from the Federal Aviation Administration, required information that is material and relevant to the performance or the maintenance or operation of such aircraft, or the component, system, subassembly, or other part, that is casually related to the harm which the claimant allegedly suffered;
(2) if the person for whose injury or death the claim is being made is a passenger for purposes of receiving treatment for a medical or other emergency;
(3) if the person for whose injury or death the claim is being made was not aboard the aircraft at the time of the accident; or
(4) to an action brought under a written warranty enforceable under law but for the operation of this Act.
(c) General Aviation Aircraft Defined. — For purposes of this Act, the term "general aviation aircraft" means any aircraft for which a type certificate or an airworthiness certificate has been issued by the Administrator of the Federal Aviation Administration, which, at the time such certificate was originally issued, had a maximum seating capacity of fewer than 20 passengers, and which was not, at the time of the accident, engaged in scheduled passenger-carrying operations as defined under regulations in effect under the Federal Aviation Act of 1958 (49 U.S.C. App. 1301 et seq.) at the time of the accident.
(d) Relationship to Other Laws. —This section supersedes any State law to the extent that such law permits a civil action described in subsection (a) to be brought after the applicable limitation period for such civil action established by subsection (a).
Section 3. OTHER DEFINITIONS.
For the purpose of this Act—
(1) the term "aircraft" has the meaning given such term in section 101(5) of the Federal Aviation Act of 1958 (49 U.S.C. 1301(5));
(2) the term "airworthiness certificate" means an airworthiness certificate issued under section 603(c) of the Federal Aviation Act of 1958 (49 U.S.C. 1423(c)) or any predecessor Federal statute;
(3) the term "limitation period" means 18 years with respect to general aviation aircraft and the components, systems, subassemblies, and other parts of such aircraft; and
(4) the term "type certificate" means a type certificate issued under section 603(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1423(a)) or under any predecessor Federal statute.
Section 4. EFFECTIVE DATE; APPLICATIONS OF ACT.
(a) Effective Date. —Except as provided in subsection (b), this Act shall take effect on the date of the enactment of this Act.
(b) Application of Act. —This Act shall not apply with respect to civil actions commenced before the date of the enactment of this Act.

[433] *Id.* § 3(3).

The definition of "general aviation aircraft" requires a type certificate or airworthiness certificate issued by the Federal Aviation Administration, which at the time of issuance, had a maximum seating capacity of 20 passengers, and which was not at the time of the accident engaged in scheduled passenger-carrying operations as defined by Federal Aviation Regulations.[434]

The statute of repose applies not only to aircraft, but also to any component, system, subassembly, or other part of a general aviation aircraft.[435]

The federal statute of repose supersedes only those state laws which would permit the action to be filed after the expiration of the federal statute of repose, but does not supersede any state law statute of repose or statute of limitations which would require the earlier filing of such an action.[436]

The federal statute of repose also includes exceptions for (1) case in which a manufacturer knowingly misrepresents to or conceals from the Federal Aviation Administration required information relevant to the performance, maintenance or operation of an aircraft or component;[437] (2) cases in which the person injured or killed is a passenger for purposes of receiving treatment for medical or other emergency;[438] (3) cases in which the person injured or killed is not aboard the aircraft at the time of the accident;[439] or (4) cases actionable under a written warranty enforceable under the law.[440]

Significantly, the statute of repose is based upon the date of the accident, and not the date of commencement of the suit. Other forms of products liability statutes or repose typically preclude the *commencement of actions* following expiration of the statute of repose, but the Act precludes filing an action *if the accident occurs eighteen years after the statute of re-*

---

[434] *Id.* § 2(c).
[435] *Id.* § 3(3).
[436] *Id.* § 2(d).
[437] General Aviation Revitalization Act § 2(b)(1).
[438] *Id.* § 2(b)(2).
[439] *Id.* § 2(b)(3).
[440] *Id.* § 2(b)(4).

pose.[441] Accordingly, unlike other statutes of repose, the Act will not in any case shorten the time of filing product liability actions, which may be brought within the otherwise applicable state statute of limitations or statute or repose, as long as the accident was within eighteen (18) years of the date of commencement of the limitation period. On the other hand, it can be expected that certain challenges will be made to the application of the statute to actions not previously commenced for accidents prior to the effective date of the legislation, which became barred by the enactment of the federal statute of repose.

The immediate effect of the Act was the announcement that the Cessna Aircraft Company would resume the manufacture of piston-powered general aviation aircraft, and that Piper Aircraft Corporation considered its chances of emerging from Chapter 11 bankruptcy to have been enhanced. Based upon the age distribution of the existing fleet of general aviation aircraft, this federal legislation should substantially limit the products liability exposure of all manufacturers.

B. Economic Loss Doctrine

The Alaska Supreme Court considered the issue of strict products liability and economic loss in its decision in *Pratt & Whitney Canada, Inc. v. Sheehan.*[442] The *Sheehan* case arose from damage to a Dehaviland Turbo-Beaver, owned and piloted by Joseph Sheehan. The aircraft's engine experienced a catastrophic failure shortly after takeoff. The resulting forced landing caused substantial damage to the aircraft, including damage to both the air frame and the engine. Sheehan filed suit, including claims for strict products liability for the resulting property damage. The trial court entered judgment in the amount of approximately $393,000, and both parties appealed.

---

[441] *See generally,* Frumar, Products Liability § 26.05; Ariz. Rev. Stat. Ann. § 12-551 (1978); Colo. Rev. Stat. § 13-21-430(3) (1977); O.C.G.A. § 51-1-11(b)(2) (1987); Ind. Code Ann. § 33-1-1.5-5 (1989).

[442] 852 P.2d 1173 (Alaska 1993).

Pratt & Whitney Canada argued that the economic loss for the damage to the aircraft should not be compensable in a tort action for strict product liability. The parties acknowledged that *Northern Power & Engineering Corp. v. Caterpillar Tractor Co.* "held that a litigant may recover economic loss in strict products liability if the 'defective' product creates a situation potentially dangerous to persons or other property, and loss occurs as a result of that danger."[443] The court then noted the parties' acknowledgment that "mid-flight engine failure caused by a defective product is a paradigmatic example of a 'potentially dangerous' situation for which economic loss is recoverable."[444] Nevertheless, Pratt & Whitney Canada urged the Alaska Supreme Court to overrule its earlier decision in favor of a *per se* ban on recovery for economic loss, particularly for damage to the product itself.

In addressing Pratt & Whitney Canada's challenge to Alaska's "potentially dangerous" exception the court noted that two extreme positions on recovery of economic loss, particularly resulting from damage to the product itself, are represented by *Seely v. White Motor Co.*,[445] and *Santor v. A & M Karagheusian, Inc.* [446] The court also noted that the United States Supreme Court had discussed the issue of recovery of economic loss and strict products liability in its decision in *East River Steamship Corp. v. TransAmerica Delaval, Inc.*[447] In that case, the U.S. Supreme Court considered the extreme positions represented by *Seely* and *Santor*, as well as the intermediate approach involving "potentially dangerous" situations as adopted by the Alaska Supreme Court in *Northern Power*. The U.S. Supreme Court rejected the "potentially dangerous" intermediate rule of *Northern Power* on the grounds that "[t]he tort concern with safety is reduced

---

[443] *Id.* at 1175.

[444] *Id.*

[445] 403 P.2d 145 (Cal. 1965) (holding that economic loss is recoverable in contract, but not in strict products liability).

[446] 207 A.2d 305 (N.J. 1965) (holding that economic loss is recoverable in strict products liability).

[447] 476 U.S. 858 (1986).

when an injury is only to the product itself."[448] The Court held that the intermediate approach was "too indeterminate to enable manufacturers easily to structure their business behavior."[449]

The Alaska Supreme Court also considered the extent to which each of the foregoing rules had been adopted in other states. The court noted that the majority tended to follow the rule that economic loss was not recoverable in products liability actions.[450] However, the court noted that many of these cases involved adoption of the rule over a vigorous dissent.[451] Additionally, the court noted that at least one commentator cites the "intermediate position" as the majority rule.[452]

The Alaska Supreme Court focused on the potential danger to customers and consumers, as well as on the importance of tort law in promoting product safety as important considerations in determining the extent of products liability remedies.[453] The court quoted with approval, a dissenting opinion from the Wyoming Supreme Court which stated:

> [The intermediate rule reflects] not only the developing direction of case law but socially appropriate engineering philosophy directed toward better products and a safer environment. Neither the pure East River idiom nor its half of a loaf commercial transaction offspring as a minority posture deserve adaptation for either consumer or commercial purchasers in this jurisdiction. Confining recovery to contractual remedies makes no real sense. . . . Sometimes by fortuity, other property or personal injury will not result but, unfortunately, fortuity is not continuity and with faulty and dangerous products, there will inevitably be injury and other property damage in time.[454]

---

[448] *Id.* at 871.
[449] *Id.* at 870.
[450] *Pratt & Whitney Canada*, 852 P.2d at 1180.
[451] *Id.*
[452] *Id.*
[453] *Id.* at 1173.
[454] *Id.* at 1180-81 (quoting Continental Ins. Co. v. Page Eng'g Co., 783 P.2d 641, 684-85 (Wyo. 1989)(Urbigkit, J., dissenting)).

Finally, the court noted in its opinion that application of contract law would be ineffective because either through a disparity in bargaining position or through appropriate limitations on warranties and remedies, manufacturers of potentially dangerous products could limit their responsibility for contract damages.[455] Accordingly, the Alaska Supreme Court rejected Pratt & Whitney Canada's argument for adopting a prohibition on recovery of economic loss in products liability actions. The Court retained its rule that a strict products liability recovery was available in cases involving property damage to the product itself in "potentially dangerous" situations.[456]

C. Government Contractor Defense

In *Bailey v. McDonnell-Douglas Corp.*,[457] the Fifth Circuit Court of Appeals addressed the applicability of the government contractor defense to so-called manufacturing defect claims. Plaintiff's claims in *Bailey* arose from the crash of a McDonnell-Douglas F-4J Phantom in which the trim system allegedly locked in the nose-down position due to a failure of a component in the aircraft trim system. Plaintiff contended that the failure of the component was due to a "manufacturing defect" and that the tendency of the trim system to "lock" in the nose-down position was a "design defect."[458]

McDonnell-Douglas filed a motion for summary judgment on all claims, which was granted by the district court. On prior appeal to the Fifth Circuit Court of Appeals, the summary judgment was affirmed as to the design defect claim, but vacated and remanded for further consideration

---

[455] *Pratt & Whitney Canada*, 852 P.2d at 1180.

[456] The court also noted that adopting Pratt & Whitney Canada's argument that economic loss was not recoverable in strict products liability actions for damage to the product itself would also have required the court to consider whether damage to the air frame, as well as the allegedly defective engine, was damage to the product itself. *Id.* at 1175 n.3.

[457] 989 F.2d 794 (5th Cir. 1993).

[458] *Id.* at 796.

of the manufacturing defect claim.[459] On remand, the district court rejected the plaintiff's argument that the government contractor defense did not apply to manufacturing defects, and held that a manufacturing defect claim was simply another way of stating that the airplane did not conform to the government's *design* specifications.[460]

The Fifth Circuit Court of Appeals rejected this reasoning, stating that it was possible for manufacturing defects to exist with respect to materials of manufacture which were not included in the government specifications.[461] Further, the Fifth Circuit Court of Appeals rejected any reliance upon the labels "design defect" or "manufacturing defect" in an extensive review of prior government contractor defense cases.[462] Instead, the court stated that the proper analysis was the three-pronged approach used in *Boyle v. United Technologies Corp.*: "(1) the United States approved *reasonably precise* specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."[463]

The court stated that a faithful adherence to the *Boyle* analysis would demonstrate that certain manufacturing defects were subject to the government contractor defense, particularly where there was a defect in the government specifications for materials or methods of manufacture.[464] Under these circumstances, the government contractor would be liable only for a non-conformity with the government specifications. On the other hand, in cases involving defects in materials or methods of manufacture which did not involve reasonably precise government specifications as

---

[459] Bailey v. McDonnell-Douglas Corp., 947 F.2d 1486 (5th Cir. 1991) (unpublished).

[460] *Bailey*, 989 F.2d at 798.

[461] *Id.* at 799.

[462] *Id.* at 801.

[463] *Id.* at 798 (emphasis added) (quoting Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988)).

[464] *Id.* at 801.

to the materials and methods of manufacture, the government contractor defense would not apply. Both of these results are simply the application of the first and second prongs of the *Boyle* analysis, and neither of these results depends on any inquiry other than into the government specifications or any non-conformity. The analysis is totally independent of any consideration or labeling of the specifications as "design" or "manufacturing." The Fifth Circuit Court of Appeals expressly rejected further use of that terminology in government contractor cases.[465]

Finally, the court held that, at the time McDonnell-Douglas filed its motion for summary judgment, an affidavit was in the record which created an issue of fact as to the existence of a metallurgical defect in the material used in the suspect component.[466] The court stated that the government contractor defense is an affirmative defense and that McDonnell-Douglas would have the burden of proof on that defense at trial.[467] As such, it also had the burden of coming forward "with evidence [on summary judgment] which would entitle it to a directed verdict if the evidence went uncontroverted at trial."[468] It is "only *after* the moving party meets this burden [that] . . . the non-moving party [must] produce its 'significant probative evidence'" to defeat the motion for summary judgment.[469] In this case, McDonnell-Douglas did not present evidence that the three *Boyle* conditions had been satisfied with regard to the metallurgical defect and was not entitled to summary judgment.[470] Accordingly, the case was reversed and remanded to the district court.

The issue of a government contractor's liability for wrongful death of combat personnel due to alleged manufacturing defects in military armament is the subject of the

---

[465] *Bailey*, 989 F.2d at 801.

[466] *Id.* at 802.

[467] *Id.*

[468] *Id.*

[469] *Bailey*, 989 F.2d at 801.

[470] *Id.*

decision in *Bentzlin v. Hughes Aircraft Co.*[471] In *Bentzlin*, the plaintiffs' decedents were all United States Marines killed during combat operations as a part of Operation Desert Storm. As stated by plaintiffs:

> [T]he Marines were riding in a light armored vehicle toward enemy Iraqi land forces when a Maverick AGM-65D missile, fired from a U.S. Air Force A-10 aircraft, struck the vehicle and killed the Marines. Plaintiffs claim that a manufacturing defect caused the missile to deviate from its intended target and strike the Marines.[472]

Prior to the filing of the motions to dismiss, the United States intervened in order to support the plaintiffs' motion. All defendants moved to dismiss the complaint on the following grounds: "(1) the Political Question Doctrine renders the case nonjusticiable; (2) the State's Secrets privilege bars adjudication of the case; and (3) common law preempts state law tort actions against government contractors that arise out of combat."[473] After an extensive analysis, the district court granted the motions to dismiss on all three of the foregoing grounds.

Significantly, the court fully analyzed the "government contractor defense" as it related to the alleged manufacturing defects in this case.[474] The court noted that *Boyle v. United Technologies Corp.*[475] had expressly limited the "government contractor defense" to design defects.[476] Nevertheless, the district court applied the *Boyle* test to determine whether the case involved "uniquely federal interests" and whether a "significant 'conflict' exists between an identifiable 'federal policy or interest and the operation of state law.'"[477]

The District Court limited its decision to cases involving technically sophisticated single purpose, single-use military

---

[471] 833 F. Supp. 1486 (C.D. Cal. 1993).
[472] *Id.* at 1487.
[473] *Id.*
[474] *Id.* at 1488.
[475] 487 U.S. 500 (1988).
[476] *Bentzlin*, 833 F. Supp. at 1489.
[477] *Id.* at 1489.

products intended to be used only in combat and without any commercial counterpart.[478] The court noted that such products by their nature are designed to be destroyed as a result of their use and cannot be field tested.[479] Also, in a determination as to whether a manufacturing defect existed, even if parts of the product are available (as was the case here), the disclosure of secret design data would be required in order to allow a trier of fact to determine the existence of a manufacturing defect.[480] The court noted that such impediments probably would not be presented in the case of injuries due to the use of a truck, or, possibly, even a military helicopter.[481] Nevertheless, with regard to claims involving the manufacturing of weaponry subject to strict governmental security, tort suits against manufacturers would conflict with federal interests: (1) in precluding disclosure of the design and the capabilities of such weaponry; (2) in governing the manufacturing process, particularly during wartime; and (3) in determining the duty of care in combat.[482] This latter ground was based upon the express exception to the waiver of sovereign immunity in the Federal Tort Claims Act[483] for "combatant activities." The court determined that "the combatant activities exception [also] generates a federal common law defense which immunizes manufacturers such as Hughes from state tort suits arising from war."[484]

In applying the doctrine of combat preemption, the court analyzed the relationship between the federal interest in the conduct of war and the purposes of tort law. The court stated that the purposes of tort law are deterrence, punishment, and providing compensation to innocent vic-

---

[478] *Id.* at 1490.

[479] *Id.*

[480] *Id.*

[481] *Bentzlin*, 833 F. Supp. at 1490.

[482] *Id.* at 1491-92. The district court relied upon the recent decision in *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2928 (1993) (claims brought by descendants' representatives arising from the shooting of Iranian Civil aircraft by U.S.S. Vincennes in July 1988 "tanker war").

[483] 28 U.S.C. §§ 1346(h), 2680(j) (1988).

[484] *Bentzlin*, 833 F. Supp. at 1492.

tims.[485] In a detailed analysis, the court concluded that the federal interest was in obtaining sophisticated military equipment in as timely a fashion as possible, and not necessarily requiring its contractors to "exercise great caution at a time when bold and imaginative measures might be necessary to overcome enemy forces."[486] Similarly, neither the government nor its contractors should be punished solely as a result of design or manufacturing defects occurring during wartime.[487] The court noted that the government has remedies available to it, such as the threat of terminating business relationships or bringing criminal suit against contractors whose misconduct during wartime is egregious.[488] Finally, the court noted that the victims of war should not be compensated differently from one another, particularly where a deliberate choice has been made by the government to tolerate casualties in furtherance of national interests and for some higher purpose.[489]

As a practical matter, the court noted the difficulty in preserving evidence of such cases involving battlefield casualties, as well as the effect on morale of possibly requiring soldiers to testify for and against each other's interests and the importance of "ensuring the secrecy of wartime military decision-making due to the causation issues that arise from such suits."[490]

The court also considered the State Secrets privilege. The court stated that "[t]he State Secrets privilege is a common law evidentiary rule that allows the Government to withhold from discovery military secrets whose disclosure would be harmful to national security."[491] The court indicated that the State Secret privilege also required dismissal in this case. The court concluded that the Maverick missile

---

[485] *Id.* at 1493.

[486] *Id.* (citing *Koohi*, 976 F.2d at 1334-35).

[487] *Id.*

[488] *Id.*

[489] *Bentzlin*, 833 F. Supp. at 1494-95.

[490] *Id.* at 1495.

[491] *Id.* (citing United States v. Reynolds, 345 U.S. 1, 7-8 (1953), and Ellsberg v. Mitchell, 709 F.2d 51, 65 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984)).

continues to be an important weapon and any discovery into its capabilities could hamper future use.[492] The State Secret privilege would preclude plaintiffs from proving a manufacturing defect and also would prejudice Hughes' ability to defend against the plaintiffs' case.[493]

Finally, the court held that the Political Question Doctrine also rendered the plaintiffs' suit nonjusticiable.[494] The court determined that the trier of fact could not reach the issue of a manufacturing defect without eliminating other variables which necessarily involved political questions.[495] The orders to the A-10 pilots and ground crew clearly would be involved in determining whether the product was used for the purpose intended.[496] These orders involved the implementation of executive branch policy decisions clearly beyond the competence of the court to review.[497]

The court distinguished the Ninth Circuit's refusal to dismiss the plaintiffs' claims in *Koohi*, on the basis that *Koohi* involved "claims on behalf of civilians; [and] tort suits brought by civilian plaintiffs are clearly within the judicial system's expertise."[498] In contrast, plaintiffs' suit was brought on behalf of soldiers, serving within the Executive Branch. Accordingly, the court dismissed plaintiffs' claims.[499]

---

[492] *Id.* at 1496-97.

[493] *Id.* Even if there was no claim of State Secret privilege by the United States, the court said that even under the government contractor defense, if the United States requested that the suit be dismissed as contrary to the federal interests, then the suit must be dismissed. The federal interest which might lead to such a claim by the United States might involve the effect of tort litigation on the ability to procure weaponry and military equipment. *Id.*

[494] *Bentzlin*, 833 F. Supp. at 1497.

[495] *Id.*

[496] *Id.* The court in reviewing the government contractor defense even went so far as to say that the concept of foreseeability was meaningless in combat situations, as weaponry and equipment often had to be used in a fashion which would never have been foreseen or contemplated by the designer. *Id.* at 1493.

[497] *Id.* at 1497-98.

[498] *Bentzlin*, 833 F. Supp. at 1497. The *Koohi* claims were dismissed, however, on the basis of "combat preemption." 976 F.2d 1328.

[499] *Id.* at 1498.

The application of the government contractor defense and the definition of "reasonably precise specifications" to which the manufacturer must prove conformity were the issues presented to the court in *Landgraf v. McDonnell Douglas Helicopter Co.*[500] Specifically, the helicopter accident involved in this case occurred when the helicopter lost power, and during a sharp turn and descent following the loss of power, one of the main rotors struck the tail boom and severed it. Military Specifications MIL-S 8698 (Mil Spec) was incorporated by reference into the detailed specifications for the OH-6A helicopter, and included the following statement:

> During operation in all flight regimes, the clearance between main rotor blades and other parts of the helicopter shall not be less than nine inches, and preferably 12 inches . . . . The design of the rotor shall be such as to preclude the possibility of the blades striking each other or any part of the helicopter . . . .[501]

McDonnell Douglas filed a motion for summary judgment on the grounds that the detailed specifications for the OH-6A were controlling and that the Army's approval of the final design of the OH-6A, notwithstanding the incorporated military specification, demonstrated conformity to a reasonably precise specification.

Plaintiff argued that the Mil Spec was a part of the design specification and that there was no deviation from the Mil Spec set out in the detailed specifications, even though there were numerous deviations expressly approved from other similar specifications.[502]

The Sixth Circuit Court of Appeals rejected the argument that there were "higher tier/lower tier specifications," or that mere acceptance of the overall design by the military demonstrated conformity with reasonably precise design specifications.[503] Nevertheless, the Sixth Circuit Court

---

[500] 993 F.2d 558 (6th Cir. 1993).
[501] *Id.* at 561.
[502] *Id.* at 563.
[503] *Id.* at 564.

of Appeals reviewed the Army's 20-year involvement in the design, testing, production, and post-production testing of the helicopter, and determined the Army was aware that, under certain extreme circumstances which exceeded "normal pilot technique," the rotor could strike, and had struck the tail boom of the OH-6A aircraft.[504] Indeed, the Army had requested tests in 1969 to investigate possible design changes which would reduce the probability of such tail boom strikes. Hughes, McDonnell Douglas's predecessor, conducted such tests, and had reported to the Army that the clearance might be as little as three inches under certain circumstances, and had recommended further tests. The Army never responded to the recommendation and continued to accept the OH-6A helicopters.

The failure of the Army to request further tests indicated to the Sixth Circuit Court of Appeals that the government had performed a discretionary function in deciding to accept the results of the tests in 1969.[505] The Sixth Circuit Court of Appeals summarized its holding as follows:

> Boyle makes clear that the government contractor defense is intended to protect military contractors from state tort liability when they produce equipment conforming to design specifications adopted by government agencies in the exercise of their discretion. This is such a case. We agree with the interpretations of *Boyle* reached by the *Harduvel*[506] and *Kleeman*[507] courts as well.[508]

---

[504] *Id.* at 563-64.

[505] *Landgraf*, 993 F.2d at 564.

[506] Harduvel v. General Dynamics Corp., 878 F.2d 1311 (11th Cir. 1989) (holding that government contractor defense applies if government either approves specifications *or* has actually participated in discretionary design decisions in designing the product).

[507] Kleeman v. McDonnell Douglas Corp., 890 F.2d 698 (4th Cir. 1989) (holding that "general qualitative specifications" such as requirement that landing gear must meet all normal landing loads without causing uncontrolled motion of plane, may only represent hopes for intended and wanted results, but product still meets reasonably precise design specifications if it satisfies an "intended configuration," even if does not achieve intended or wanted results).

[508] *Landgraf*, 993 F.2d at 564.

A dissenting opinion acknowledged the position taken by the majority, but remained unsatisfied as to what the "reasonably precise specifications" were in this case.[509] The dissent argued that the failure to request further tests may have indicated that the Army did not fully understand the significance, or the results, of the tests underlying Hughes' recommendation for further investigation.[510] Further, a specific warning in the 1969 pilot's operator's manual described abrupt and erratic control movements that should "be avoided to prevent a rotor blade strike on the tail boom."[511] The dissent stated that, even if the operator's manual was the ultimate expression of the reasonably precise specifications, it was not clear that the accident, had in fact, been caused by the types of control movements described in the pilot's operating manual, or even those which were the subject of the 1969 tests.[512] The dissent believed that the Mil Spec standards were not superseded, except with respect to those specific hazards, and that a deviation from the Mil Spec under circumstances other than those known to the Army either through the 1969 tests or the pilot's operating handbook might constitute a basis for liability on the part of the government contractor.[513]

In *Lewis v. Babcock Industries*[514] the Second Circuit Court of Appeals addressed the applicability of the "government

---

[509] *Id.* (Jones, J., dissenting).

[510] *Id.* at 567.

[511] *Id.*

[512] *Id.*

[513] *Landgraf*, 993 F.2d at 567. The dissent summarized as follows:

> What were the "ultimate" reasonably precise specifications as they relate to the main rotor blade-tail boom clearance in this case? Based on one's view of the record evidence, the answer to this question could lie anywhere between no clearance at all and nine inches, with three inches being a reasonable possibility. And one's answer essentially determines the availability of the government contractor defense. Since the [record], viewed in a light most favorable to the non-moving party [citations omitted], show[s] there to be a genuine issue of fact on an issue critical to whether McDonnell Douglas is entitled to the government contractor defense in this case, I would reverse the grant of summary judgment, and remand the case for further proceedings.

Id. at 568.

[514] 985 F.2d 83 (2d Cir.), *cert. denied*, 113 S.Ct. 3041 (1993).

contractor defense" in a case in where the Air Force was aware of the alleged defective condition of the part which failed in the accident, but chose to continue ordering and using the part.[515] The *Lewis* case involved the crash of an Air Force F-111F jet fighter over England. The F-111F incorporates a self-contained crew module ejection system. After the module separates from the aircraft, a parachute system deploys and large air bags on the bottom of the module inflate and cushion the landing. In this case, one of the cables which connect the parachute to the module severed, causing the module to land at an incorrect angle without adequate cushioning. The plaintiff sustained back injuries as a result of the impact.

Prior to the accident involved in this case, the Air Force had determined that the cables which connected the module to the parachute were subject to corrosion as a result of maintenance personnel inadvertently cutting the coating on the cables during the installation of a redesigned windshield for the F-111F. As a result of this information, the Air Force replaced the forward repositioning cables on all F-111Fs and incorporated a revision to the maintenance manual warning personnel to be careful not to cut the cable's coating during maintenance operations. Following the crash in this case, the Air Force instituted additional tests and performed a second redesign of the windshield to avoid cutting the cable's coating.

Plaintiff argued that the government contractor defense should be subject to certain prerequisites including: (1) a significant conflict between the requirements under the federal contract and state tort law; and (2) the government's exercise of its discretion in accepting a safety risk.

The Second Circuit rejected these prerequisites, holding that the standard *Boyle* three-part test satisfied the need to determine the existence of federal requirements and federal approval of the design.[516] The three-part test was stated as follows:

---

[515] *Id.* at 84.

[516] *Lewis*, 985 F.2d at 85.

> Under this defense, conflicting state law is displaced "when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."[517]

The Second Circuit emphasized that these requirements preclude the application of the government contractor defense when the government does not establish detailed specifications, or when the government merely rubber stamps the design.[518] In this case, the court affirmed the district court's finding that approval of reasonably precise specifications could be established by the military's participation in the design and testing of the module, including the cables, as well as by the continued use of the cable by the military "after it found out that it was susceptible to corrosion when cut."[519] "In effect, the district court held that approval may be established by the Government's continued use of a product after it learns of the defect."[520]

The plaintiff urged that the *Boyle* test be limited to defects which are discovered during the initial design of the product. The court rejected this limitation, and determined that the order and acceptance of the alleged defective part after the defect was fully known to the government constituted sufficient acceptance and approval of the specification.[521]

Finally, the Second Circuit rejected the plaintiff's argument that the government was misled by the defendants to believe that the cause of the problem was the design of the windshield which was cutting the cables, rather than the easy penetrability of the coating.[522] The court noted the government's own pre-accident reports indicated the wind-

---

[517] *Id.* at 85-86 (quoting *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988)).

[518] *Id.* at 87.

[519] *Id.* at 86.

[520] *Id.*

[521] *Lewis*, 985 F.2d at 89.

[522] *Id.* at 90.

shield clips were the primary cause of damage, thereby recognizing that there may be other causes of the coating being cut.[523] Under these circumstances, regardless of the cause of the coating being cut, the government was aware of the propensity of the cable for corrosion when cut and chose to reorder the cable despite this knowledge. Therefore, the contractor supplying the cable was entitled to the government contractor defense.[524]

D. BANKRUPTCY

The Piper Aircraft Corporation bankruptcy has resulted in two decisions relating to the effect of Chapter 11 bankruptcy on post-petition products liability actions. Specifically, the issue presented to the court in *Piper Aircraft Corp. v. Calabro*[525] involved whether the filing of the Piper Aircraft Corporation Chapter 11 bankruptcy would affect product liability actions against the debtor for accidents which occurred after the date of filing, but before the date of confirmation of any bankruptcy plan of reorganization. The U.S. Bankruptcy Court for the Southern District of Florida held that such post-petition, but pre-confirmation accidents were "claims" under Section 101 (5) of the Bankruptcy Code, and that the prosecution of such state law claims against the debtor post-petition was subject to the automatic stay in bankruptcy.[526]

As will be discussed below, the Court previously had held that any class of future products liability claimants could not be identified with sufficient specificity to meet the definition of "claims" under section 101(5) of the Bankruptcy Court. Nevertheless, the Bankruptcy Court in *Calabro* determined that Calabro's claim arising from a post-petition, pre-confirmation accident either arose or would be deemed to have arisen pre-petition.[527] Alternatively, the court ruled

---

[523] *Id.*
[524] *Id.*
[525] *In re* Piper Aircraft Corp. 169 B.R. 766 (Bankr. S.D. Fla. 1994).
[526] *Id.* at 772-773.
[527] *Id.* at 775-776.

that the definition of claim under section 101(5) did not require that the claim be determined based on the filing date, but included pre-confirmation events similar to those involved in other claims against the debtor which would be treated under the plan.[528]

The most significant decision arising from the Piper Aircraft Corporation bankruptcy is the decision that future products liability tort actions are not "claims" under section 101(5) of the Bankruptcy Code.[529] The Bankruptcy Court had approved the appointment of a special class of future product liability tort claimants. Dean Epstein argued that the class of future claimants held "claims" to be administered under any Chapter 11 plan of reorganization.[530] The debtor and the unsecured creditors' committee objected to including such claims in the Piper Aircraft Corporation bankruptcy, and the bankruptcy court affirmed the objection.

In an extensive opinion by Judge Mark, the court held that the class of future accident claimants was too indefinite to be considered a class of claimants under section 101(5) of the Bankruptcy Code.[531] The court distinguished the treatment of future products liability claims in other Chapter 11 proceedings involving manufacturers on the grounds that in those cases the claimants were persons who had come into pre-petition contact with the product and therefore were identifiable.[532] In the case of an aircraft manufacturer, however, the group of persons who might come into contact with the aircraft at a later date and who might be injured in an aircraft accident basically included the entire

---

[528] *Id.* at 780.

[529] *In re* Piper Aircraft Corp., 162 B.R. 619 (Bankr. S.D. Fla.), *aff'd sub nom.*, Epstein v. Official Comm. of Unsec. Creditors of the Estate of Piper Aircraft Corp., 168 B.R. 434 (S.D. Fla. 1994).

[530] At the time, the court was considering a possible sale of the assets of Piper Aircraft Corporation and the need to establish a class for distribution for future product liability claimants from the proceeds of any sale of the assets of Piper Aircraft Corporation. The claim was in the approximate amount of $100,000,000. *Id.* at 621-22.

[531] *In re* Piper, 162 B.R. at 622-629.

[532] *Id.*

world.[533] As such, there was no identifiable class to be considered as "claimants" under section 101(5) of the Bankruptcy Code.[534] The bankruptcy court's decision was appealed to the U.S. District Court, which affirmed the decision on the same basis.[535]

E. EVIDENCE

The D.C. Circuit decision in *Joy v. Bell Helicopter Textron, Inc.*[536] involved several evidentiary and trial practice issues of importance. First, the case involved the admission of evidence concerning other alleged similar incidents.[537] The case also involved the application of the doctrine of negligence *per se* and the sudden emergency doctrine.[538] Finally, the case involved certain evidentiary issues pertaining to proof of future lost earnings and related expert testimony under Federal Rule of Evidence 702.

The *Joy* case resulted from a helicopter accident in the District of Columbia in which a 1987 Bell helicopter suffered a power failure and crashed into the Potomac River. At the time of the accident, the helicopter was operating within the restricted height/velocity (H/V) zone and was unable to perform a successful autorotation. The pilot of the helicopter contended that it was necessary to transition the restricted area of the H/V zone in order to make a but-

---

[533] *Id.*

[534] *Id.*

[535] Both the bankruptcy court and the U.S. District Court for the Southern District of Florida stated that the denial of a bankruptcy remedy to future claimants did not necessarily bar any recovery by such future claimants. As stated by Bankruptcy Judge Mark:

> In determining that the Future Claimants do not hold claims under the Bankruptcy Code, the Court is not determining whether any or all of the future victims may have a non-bankruptcy future remedy. The nature of the reorganization plan eventually confirmed in the case may affect the result as will, in the event of a sale of Piper's assets, application of successor liability laws which may vary among the states. The ruling simply means that the future claims are not bankruptcy "claims" that will be administered in this case.

In re Piper Aircraft Corp., 162 B.R. at 629; *see also* 168 B.R. at 440 n.13.

[536] 999 F.2d 549 (D.C. Cir. 1993).

[537] *Id.* at 554.

[538] *Id.* at 557.

ton-hook turn required by the air traffic controllers near Washington National Airport. Additionally, the pilot's altitude was limited to less than 200 feet along a specified helicopter route to avoid commercial traffic at Washington National Airport.

The cause of the engine failure was a separation of the spur adaptor gear shaft, which is one of the components which connects the turbine section of the engine to the compressor section. The plaintiff contended that the component failed because it had been improperly carburized. The defendant contended that the part had been subjected to improper operating forces because it had been misaligned during an overhaul by a third party, and because foreign material in the engine's oil system blocked the flow of oil to the forward spline of the spur adaptor gear shaft.

The first evidentiary issue considered by the court was the admissibility of evidence of other spur adaptor gear failures.[539] The plaintiff contended that these reports were not being placed into evidence to prove the cause of the accident, but merely to rebut the defense that the spur adaptor gear could not have been defective because it was manufactured according to specifications.[540] According to plaintiffs, this evidence showed failures of the spur adaptor gear within the recommended operating life of the component.[541] The district court concluded that the evidence was relevant to the defense that the part could not fail because it was manufactured according to specifications.[542] Moreover, the court refused to reverse the district court's discretionary ruling *not to exclude* the evidence under Federal Rules of Evidence 403.[543]

The court distinguished *Brooks v. Chrysler Corp.*[544] on the grounds that there the "minimally probative" evidence *had been excluded* and the trial court's discretion had not been

---

[539] *Id.* at 554.
[540] *Id.* at 555.
[541] *Joy*, 999 F.2d at 555.
[542] *Id.*
[543] *Id.*
[544] 786 F.2d 1191 (D.C. Cir. 1986).

reversed.[545] In *Joy*, however, the trial court had exercised its discretion *to allow the reports* into evidence.[546] Finally, the court noted that the evidence in *Brooks* involved significant amounts of extraneous and highly inflammatory material, while the reports involved in this case "played only a minor role during the two week trial."[547]

Allison, the main manufacturer of the helicopter's engine, argued that the jury instructions had been improper in that they only focused on whether the spur adaptor gear was in a substantially changed condition.[548] Allison contended that the issue should have been whether either the engine or the helicopter was in a substantially changed condition, based upon improper overhaul and failure to properly service the engine lubrication system.[549] The court rejected Allison's argument on the grounds that the charge permitted the jury to determine that the spur adaptor had been "substantially changed as a result of the misalignment [of the helicopter drive mechanism] or poor lubrication [of the engine]."[550]

Allison also had filed claims for contribution against the pilot and against the District of Columbia.[551] The claims against the pilot were based upon the failure to maintain a proper height and velocity. Allison contended that the jury should have been instructed on negligence per se based upon violations of Federal Aviation Regulation § 91.79 [552] and Federal Aviation Regulation § 91.13(a).[553] The court held that these regulations were simply another way of say-

---

[545] *Joy*, 999 F.2d at 555-56.

[546] *Id.*

[547] *Id.* at 556.

[548] *Id.*

[549] *Id.* at 557.

[550] *Joy*, 999 F.2d at 557.

[551] *Id.*

[552] 14 C.F.R. § 91.119 (1994) (maintaining altitude from which an emergency landing can be made in event of power loss).

[553] 14 C.F.R. § 91.13(a) (1994) ("no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another").

ing that a pilot must exercise due care, and were not the basis for an instruction on negligence per se.[554]

Allison also contended that the court erred in instructing the jury on the sudden emergency doctrine if the negligence of the pilot had partially caused the emergency.[555] The court agreed that the sudden emergency doctrine seemed to be inappropriate, but stated that the instruction specifically stated the sudden emergency must be one "not of [the pilot's] own making."[556] The instruction, therefore, would have been irrelevant if the jury accepted Allison's contention as to the cause of the crash.[557]

Another of the defendant's arguments was that there was insufficient evidence to support the jury's finding that the pilot was not negligent since he admitted flying the helicopter within the restricted area of the H/V diagram.[558] The pilot testified that during the course of a button-hook maneuver, the helicopter necessarily reduced its speed below that required by the H/V diagram.[559] The pilot also testified that it was not possible to fly at a higher altitude due to the FAA restrictions in the helicopter corridor near Washington National Airport.[560]

Allison contended that the witness statements indicated the helicopter was merely hovering and that such a hover was clearly negligent.[561] The D.C. Circuit noted, however, that the pilot's own testimony, as well as that of one of the ground witnesses, appeared to support the conclusion that the pilot was, in fact, engaged in a button-hook turn at the time of the power failure.[562] The D.C. Circuit seemed to be particularly impressed by the fact that FAA restrictions governing the flight precluded a higher altitude.[563] Appar-

---

554 *Joy*, 999 F.2d at 558.
555 *Id.* at 559.
556 *Id.*
557 *Id.*
558 *Id.* at 560.
559 *Joy*, 999 F.2d at 560.
560 *Id.*
561 *Id.*
562 *Id.* at 561.
563 *Id.*

ently, the court also believed there was sufficient evidence that the FAA procedures required the turn.[564] Accordingly, the court supported the jury's finding.[565]

Allison also filed a contribution claim against the District of Columbia for negligence in the attempt to rescue the passengers from the Potomac River.[566] The D.C. Circuit certified that question to the District's court of appeals.[567]

Finally, the D.C. Circuit agreed with the defendant that the damage awards to the widow of Robert Joy were improper and excessive.[568] The court held that she was not entitled to recover lost consortium in addition to her wrongful death claim.[569] Moreover, the court held that expert testimony from an economist as to projected future earnings for Mr. Joy were merely guesswork, speculation and conjecture.[570] The court held that the Federal Rule of Evidence 702, which permitted expert testimony had been relaxed, but not to the extent that mere speculation was permitted in the form of opinion.[571] Moreover, the D.C. Circuit rejected "the temptation to answer objections to receipt of expert testimony with the shorthand remark that the jury will give it 'the weight it deserves'."[572] Instead, the court stated its intention to "turn a 'sharp eye' to those instances, hopefully few, where . . . the decision to receive expert testimony was simply tossed off to the jury under a 'let it all in' philosophy."[573]

The court concluded by referring to the recent U.S. Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[574] in which the Supreme Court stated that Rule 702 "clearly contemplates some degree of regula-

---

564 *Joy*, 999 F.2d at 561.
565 *Id.*
566 *Id.*
567 *Id.* at 563.
568 *Id.* at 564.
569 *Joy*, 999 F.2d at 564.
570 999 F.2d at 568.
571 *Id.* at 568-69.
572 *Id.* at 569.
573 *Id.*
574 ___ U.S. ___, 113 S. Ct. 2786 (1993).

tion of the subjects and theories about which an expert can testify."[575] The D.C. Circuit paraphrased the Supreme Court as follows:

> . . . Rule 702 permits an expert to testify only when 'scientific, technical or other specialized *knowledge* will assist the trier of fact,' id. (quoting Fed. R. Evid. 702) (some emphasis deleted), and that "the word 'knowledge' connotes more than subjective belief or unsupported speculation." As discussed above, [the economist's] testimony concerning Mr. Joy's future career path fails to meet this standard.[576]

V. FEDERAL TORT CLAIMS ACT (FTCA)

A. Discretionary Function

The discretionary function exemption to the Federal Tort Claims Act[577] was addressed in *Mellott v. United States.*[578] That case resulted from an accident in which an agricultural aircraft collided with guy wires to a power pole maintained by the Western Area Power Administration (WAPA), an agency of the United States. The United States moved to dismiss the claim based upon the discretionary function exception. The United States argued that the WAPA had adopted the guidelines of the Federal Aviation Administration in deciding how to mark power lines like those involved in this case. The WAPA admitted that there were instances in which it had marked lines on occasions where the FAA did not require such marking, but that it made those decisions grounded on the "technical, *economic, social,* environmental and *political* factors which are present in each situation."[579] As such, these additional decisions were subject to the discretionary function exemption, which precludes liability for decisions "grounded in social, economic and political policy."[580]

---

[575] *Id.* at 2795.
[576] *Joy,* 999 F.2d at 570.
[577] 28 U.S.C. § 2680(a) (1988).
[578] 808 F. Supp. 746 (D. Mont. 1992).
[579] *Id.* at 748 (emphasis added).
[580] *Id.* at 749.

The United States District Court for Montana agreed. The Court distinguished the Supreme Court decision in *Indian Towing Co. v. United States*,[581] and the "Good Samaritan" doctrine under Sections 323 - 324A of the Second Restatement of Torts. It distinguished *Indian Towing* on the grounds that it did not involve a discretionary function exemption claim.[582] The court also rejected the Good Samaritan doctrine because discretionary decisions, even if negligently carried out, are excluded from the waiver of liability under the Federal Tort Claims Act.[583]

The plaintiff also argued that, because the government had made a decision to mark the guy lines for snowmobiles, it had a duty to exercise reasonable care in marking the guy lines for other hazards as well, including hazards to aviation.[584] The Court held that the two part test in *Berkovitz v. United States*,[585] was met in this case since the decision to mark the wires for ground traffic also fell within the discretionary function exemption.[586] It fell within the exemption because the decision to mark the guy wires for snowmobilers was based upon concerns raised by landowners in the area, cost effectiveness, and the beneficial and adverse environmental effects of marking the wires.[587] Thus, the steps taken to mark the wires in certain instances to protect snowmobilers could not provide the basis for a "Good Samaritan" undertaking which might extend to aviators as well.[588]

---

[581] 350 U.S. 61 (1955).

[582] *Mellott*, 808 F. Supp. at 749.

[583] *Id.*

[584] *Id.*

[585] 486 U.S. 531 (1988). The Supreme Court established the following test for application of the discretionary function exemption:

> (1) Does the challenged conduct involve an element of choice for the acting employee; and
>
> (2) if the challenged conduct does involve a degree of choice whether that choice involves legislative or other administrative decisions "grounded in social, economic or political policy."

Id.

[586] *Mellot*, 808 F. Supp. at 750.

[587] *Id.* at 749.

[588] *Id.*

This decision substantially undermines the "Good Samaritan" doctrine as a basis for liability claims against the federal government under the Federal Tort Claims Act. If the initial undertaking by the government involves discretionary factors such as social, economic and political policy, then that undertaking cannot be broadly construed to provide the basis for liability. Instead, the Court applied the *Berkovitz* test narrowly to limit the scope of government liability to those cases in which a federal statute, regulation or policy prescribes a course of action for the employee to follow and the employee fails to follow that function. If there is any degree of choice, that degree of choice must not involve "social, economic and political policy."

An issue of federal governmental immunity was presented in *TPI International Airways v. FAA.*[589] In that case, TPI had instituted bankruptcy proceedings in the U. S. Bankruptcy Court for the Southern District of Georgia. The Federal Aviation Administration filed a claim in the bankruptcy court for $810,000 in civil penalties. TPI International Airways counterclaimed for $20,000,000 claiming that the FAA inspectors had intentionally misrepresented facts relating to certain alleged operating violations, causing TPI's officers to surrender TPI's operating specifications. The debtor alleged that it later learned that the FAA representations were incorrect and that the operating specifications should not have been surrendered.

The court focused on 11 U.S.C. § 106(a)-(c), which is a limited waiver of immunity in the Bankruptcy Code.[590] The FAA responded by stating that it could not be sued, only the United States could be sued, and then only under the Federal Tort Claims Act.[591] The bankruptcy court rejected the argument that the Federal Tort Claims Act provided the exclusive waiver of sovereign immunity and concluded that § 106(a) was an unlimited and independent waiver of sovereign immunity in cases which the government has submit-

---

[589] 141 B.R. 512 (Bankr. S.D. Ga. 1992).

[590] *Id.* at 516.

[591] 28 U.S.C. §§ 1346(h) and 2671-80 (1988 & Supp. V 1993).

ted the claim, and in which the claim against the government is a compulsory counterclaim.[592] Having concluded that the Federal Tort Claims Act was not the sole basis for the waiver of sovereign immunity, however, the court then faced the issue of whether a discretionary function exemption applied to such claims against the federal government.

The bankruptcy court analyzed the discretionary function issues by reference to Federal Tort Claims Act cases, including *United States v. Varig Airlines*,[593] *Heller v. United States*,[594] and *United States Fire & Insurance Co. v. United States*.[595] The court held that the discretionary function defense was "implicitly extended to a section 106 tort action," basing it's holding upon the language of the seminal Federal Tort Claims Act decision in *Dalehite v. United States*.[596] The *Dalehite* decision stated that even if Congress had not included a discretionary function exception to the Federal Tort Claims Act, the doctrine of separation of powers would require such an exception.[597] The bankruptcy court stated that:

> it is appropriate for the court to refuse to entertain a tort action which arises out [of] the exercise of discretionary regulatory authority . . . . Thus, although there has been waiver of immunity pursuant to Section 106(a) of the Bankruptcy Code, separate and independent from the Federal Tort Claims Act, nonetheless TPI's claims cannot be entertained due to the discretionary function exception which is implicitly applicable to the FAA's conduct.[598]

Thus, as in other discretionary function cases, the court held that the discretionary function exemption applied,

---

[592] *TPI Int'l Airways*, 141 B.R. at 517-18.

[593] 467 U.S. 797 (1984).

[594] 803 F.2d 1558, 1563 (11th Cir. 1986).

[595] 806 F.2d 1529, 1534-36 (11th Cir. 1986).

[596] 346 U.S. 15 (1953).

[597] *Id.* at 34.

[598] *TPI Int'l Airways*, 141 B.R. at 521.

even though the conduct of the regulatory agency may have been negligent or an abuse of discretion.[599]

B. Air Traffic Control

The Ninth Circuit, in *Steering Comm. v. United States, et al.*,[600] affirmed the district court finding that liability for the Cerritos air disaster should be apportioned 50 per cent each to the Estate of William F. Kramer, the pilot of the light aircraft, and to the United States.[601] The district court had based its findings of fact regarding the United States upon the result of an advisory jury determination that allocated fault and negligence in that manner. The jury also advised that Aeromexico was not negligent and that the Aeromexico pilots had complied with 14 C.F.R. § 91.67(a) (1986), which requires pilots to be vigilant in seeing and avoiding other aircraft.[602]

The United States appealed, in part, on the ground that the district court had not properly instructed the jury on the presumption of negligence arising out of a violation of 14 C.F.R. § 91.67(a). The current version of that section provides as follows:

> When weather conditions permit, regardless of whether an operation is conducted under instrument flight rules or visual flight rules, vigilance shall be maintained by each person operating an aircraft so as to see and avoid other aircraft.[603]

Under California law, violation of a safety statute intended to prevent injury or death to the class of persons injured triggers a presumption of negligence.[604] All parties agreed that any violation of the above noted regulation would require application of this presumption. Nevertheless, the appellate court concluded that the threshold question for the factual and legal determination that a violation

---

599 *Id.*
600 6 F.3d 572 (9th Cir. 1993).
601 *Id.* at 573-74.
602 *Id.* at 576.
603 14 C.F.R. § 91.113(b) (1992).
604 Cal. Evid. Code § 669(b)(1) (West 1980).

occurred was a prerequisite to the application of the California negligence presumption.[605] The court stated that the legal issue was the meaning of the word "vigilance" as used in the regulation.[606] The court listed the various possibilities as follows:

> 1. "Vigilance" requires a pilot to see and avoid other aircraft unless to do so would be physically impossible;
> 2. "Vigilance" requires a pilot to see and avoid other aircraft unless to do so would be more than unreasonable; and
> 3. "Vigilance" requires a pilot to see and avoid other aircraft unless to do so would be unreasonable.
>
> The distinction between the second and third definitions is difficult to conceptualize and even more difficult to articulate. Nevertheless, whether there is an "elevated" standard of care somewhere between reasonableness and physical impossibility is a concept debated in this case. The United States argues for the "physically impossible" and, alternatively, the "more than unreasonable" standards of care, whereas Aeromexico asserts that vigilance to see and avoid simply requires a pilot to exercise reasonable care.[607]

The court characterized the "physical impossibility" standard as approaching the imposition of strict liability on pilots for mid-air collisions.[608] The court, citing *Transco Leasing Corp. v. United States*,[609] rejected such an application of the standard because the regulation requires a pilot to "exercise vigilance," but it does not impose an absolute duty to see and avoid.[610]

The Ninth Circuit also rejected the "elevated" standard of care urged by the United States in cases involving mid-air collisions.[611] The court recognized cases cited by the government that held that pilots have a duty to attempt to compensate for blind spots by head movement and aircraft

---

[605] *Steering Comm.*, 6 F.3d at 576.
[606] *Id.*
[607] *Id.* at 576-77.
[608] *Id.* at 577.
[609] 896 F.2d 1435 (5th Cir. 1990).
[610] *Steering Comm.*, 6 F.3d at 578.
[611] *Id.*

movement, and that pilots had been held liable for mid-air collisions, even though overtaken from behind and above by other aircraft.[612] Nevertheless, the court affirmed the district court's conclusion that the standard of "vigilance," as required by the Federal Aviation Regulations, is "one of vigilance to see and avoid those aircraft a pilot could reasonably be expected to see."[613] Under this "reasonableness" standard of care, vigilance requires that the pilot search "thoroughly and diligently" for other aircraft.[614] The court stated that a "reasonably prudent pilot need not be superhuman in seeing and avoiding other aircraft, but he or she must scan the sky with such frequency and respond with such precision as is possible."[615]

In evaluating the district court's finding that the Aeromexico crew was vigilant, the court noted expert evidence of the "acquisition time" in which the unwarned Aeromexico crew, scanning the sky, was likely to see the approaching plane. The "acquisition time" was expressed in a series of probabilities as to the likelihood of seeing the approaching aircraft.[616] Defendant Aeromexico's experts contended that the likelihood or probability of acquisition did not increase to more than fifty percent until approximately six to twelve seconds before impact. Plaintiffs' experts testified that it would have been impossible for the Aeromexico pilots to have seen the approaching aircraft more than seventeen seconds before impact, and it was possible that the Aeromexico pilots "'wouldn't see [the Piper] until perhaps the last moments prior to collision'."[617] The expert for the United States testified that the Aeromexico pilots' probability of acquisition was seventy-five percent approximately 14.6 seconds before the impact.[618]

---

[612] *Id.*

[613] *Id.* at 579.

[614] *Id.*

[615] *Steering Comm.*, 6 F.3d at 579.

[616] *Id.* at 579-80 n.5.

[617] *Id.* at 580 n.5.

[618] *Id.* at 580.

Based upon the conflicting expert testimony, the district court's finding that the Aeromexico crew was "vigilant" and, therefore, reasonably diligent was not clearly erroneous.[619] The Ninth Circuit Court of Appeals noted, however, that there was other evidence suggesting "that the Aeromexico crew, if reasonably vigilant, should have seen the Piper in time to avoid the collision."[620] Nevertheless, the Ninth Circuit held that "the district court did not clearly err when it found that 'there is no evidence that Aeromexico was in any way negligent, or committed any act or omission, which contributed to this accident.'"[621]

The plaintiff's burden of proof in establishing the negligence of an air traffic controller in allegedly failing to provide accurate weather information and the extent of the controller's possession of such information were the issues presented in *Sonnemaker v. United States*.[622] This case involved an apparent in-flight breakup of a Cessna Centurion on a flight from Illinois to Orlando, Florida. The accident occurred north of Gainesville, Florida, as the pilot approached the back of a frontal system extending from west of Gainesville, Florida, and north through the Carolinas. The accident occurred at night. The pilot had received detailed weather briefings before departing Illinois, during a stop at Huntsville, Alabama, and, again, during the flight from Huntsville to Orlando. The pilot had requested successive altitude changes and had reduced his altitude from 9,000 to 5,000 feet prior to the accident. Shortly after being switched to the Jacksonville, Florida air route traffic control center, the pilot made the following inquiry:

> Jacksonville Center, are you painting any adverse weather ahead of niner eight alpha?
>
> The air traffic controller . . . replied:

---

619 *Id.*

620 *Steering Comm.*, 6 F.3d at 580.

621 *Id.*

622 807 F. Supp. 483 (C.D. Ill. 1992).

> Yeah, there is some precip there, uh, just north of Gainesville; don't look to bad, and let me get a route readout here on you; just a second; okay, your route looks pretty good right on down toward Orlando.[623]

Within five minutes of that report, the aircraft crashed near Jasper, Florida, resulting in six fatalities. The evidence at trial involved conflicting testimony as to the presence of a thunderstorm in the area of the plane at the time of the crash. The plaintiff relied primarily on ground witnesses, whereas the government relied on meteorological experts who indicated that there was a thunderstorm in the general area, but not at the location of the crash. The government buttressed its position with photographs of the Waycross, Georgia, weather station radar taken at the time of the accident. The radar did not show precipitation at the site of the crash. Plaintiff's meteorological expert admitted that, based upon the radar data alone, he also would have been unable to identify a thunderstorm in progress at the location of the crash.

The district court summarized the issue of liability as follows: "The plaintiff must persuade the court that there were patterns respectively depicting increasing levels of radar return intensity on the controller's radar screen and that the controller failed to report these patterns to the pilot upon the pilot's inquiry."[624] The court concluded that the plaintiff had not shown that it was more likely than not that the above mentioned patterns were present on the radar scope at the time of the report from the controller.[625]

As an alternative theory of liability, the plaintiff argued that the controller either should have warned the pilot that the air traffic control radar was on circular polarization and that precipitation was filtered out, or that other steps should have been taken to examine the weather. The court concluded that the air traffic controller "had a right to assume that the pilot was cognizant of the general meteoro-

---

[623] *Id.* at 484.
[624] *Id.* at 486.
[625] *Id.*

logical conditions," detailed weather briefings being the duty of the flight service station.[626] The controller's duty was only to give "correct and adequate available weather information" and to "suggest alternative routes when requested."[627] The court concluded "that there was nothing before [the] air traffic controller . . . that would have alerted him to high intensity precipitation in the path of the aircraft," particularly in view of the evidence at trial that "the Waycross weather radar [which was not on circular polarization] was not showing any significant precipitation."[628] Thus, the court concluded that the controller exercised a "degree of care that would be expected of reasonably prudent air controllers acting under the same or similar circumstances."[629] The court concluded that the accident was associated with weather conditions in crossing the frontal trough, but, that "the most probable inference to be drawn from the evidence is that the pilot flew under conditions [presumably unknown to the controller] that were beyond the capabilities of the aircraft and put himself in a position from which he could not recover."[630]

The issue of a pilot's intervening cause was addressed in *Budden v. United States.*[631] The *Budden* case arose from a helicopter accident on December 20, 1985, when a medivac helicopter crashed at approximately 7:00 p.m. in a sparsely populated area in the vicinity of Ainsworth, Nebraska. At the time of the crash, witnesses reported that the cloud ceilings were between 300 and 1,000 feet and that it was drizzling rain. Witnesses observed the aircraft flying for over eight miles in the deteriorating weather conditions. The flight operated under visual flight rules (VFR). At the time of the crash, the pilot violated both the Federal Aviation Regulations and the Medivac Operator's Flight Manual.[632]

---

[626] *Id.*

[627] *Sonnemaker*, 807 F. Supp. at 486.

[628] *Id.*

[629] *Id.*

[630] *Id.*

[631] 15 F.3d 1444 (8th Cir. 1994) [hereinafter *Budden II*].

[632] *Id.* at 1448.

Following an earlier trial, the Eighth Circuit had reversed a finding that the FAA Omaha Flight Service Station Specialist provided a proper weather briefing to the pilot.[633] The Eighth Circuit concluded that the weather briefing failed to advise the pilot of forecasts of low clouds and low visibilities along the planned flight route.[634] Accordingly, the Eighth Circuit found the Flight Service Station Specialist negligent but remanded the case to the federal district court for a determination as to proximate cause.[635]

On remand, the plaintiffs contended that the pilot was attempting to locate a place to land when he was observed by ground witnesses to be flying below extremely low clouds. The United States defended by arguing that the pilot was continuing to fly into deteriorating weather conditions and had been doing so for at least eight miles prior to the crash.

The district court determined that under Nebraska law, a plaintiff must show not only negligence but also that such negligence was the cause in fact, that the injury was a natural and probable result of the negligence, and that there was no efficient intervening cause.[636] Nebraska law presumed the pilot would not have acted negligently, however, ground witnesses'

> observations [support] the District Court's finding that [Pilot] Craig Budden breached his duty of care by failing to act reasonably when he encountered cloud ceilings below 1,000 feet and visibility of less than three miles. Budden knew or should have known that his only reasonable course of action was to abort the mission, either by turning the aircraft around or landing immediately.[637]

The Eighth Circuit also held that the "the briefer was not duty-bound to anticipate that Budden would continue the mission despite weather conditions which mandated abort-

---

[633] *See* Budden v. United States, 963 F.2d 188 (8th Cir. 1992) [hereinafter *Budden I*].

[634] *Id.* at 192-93.

[635] *Id.* at 194.

[636] *Budden II*, 15 F.3d at 1449.

[637] *Id.*

ing the flight. Thus, the district court's proximate cause determination rests on the proposition that Budden's conduct broke the causal connection between [the briefer's] breach of duty and the crash. . . ." [638] Under these circumstances, the Eighth Circuit held that the district court's ultimate finding that the pilot's negligence was the sole proximate cause of the accident was not clearly erroneous.[639]

Senior Circuit Judge Lay dissented, stating that the negligence of a pilot in proceeding under deteriorating weather conditions was a foreseeable consequence of an inadequate weather briefing.[640] The dissent further emphasized that "the doctrine that an intervening act cuts off the liability of a tortfeasor comes into play *only when the intervening cause is not foreseeable.*"[641] The dissent contended that the majority failed to consider the Nebraska comparative negligence statute, which would permit a partial recovery by the pilot and also a contribution on the payments made for the wrongful death claim of the passengers.[642] In summary, the dissent apparently would have required a specific finding of fact that the pilot's negligence was not "foreseeable," whereas the majority seemed satisfied to conclude that the briefer was not duty-bound to anticipate that the pilot would violate federal aviation regulations and continue the flight despite the deteriorating weather conditions. Thus, the majority implicitly supported a finding that the pilot's negligence under the circumstances was not reasonably foreseeable to the briefer.

The information available to an approach controller and the approach controller's duty to warn a pilot of a deviation from the published Instrument Landing System (ILS) procedure were the basis for the claims against the United

---

[638] *Id.* at 1450.

[639] *Id.* at 1451.

[640] *Id.* at 1453.

[641] *Budden II*, 15 F.3d at 1453 (quoting Lincoln Grain, Inc. v. Coopers & Lybrand, 345 N.W.2d 300, 308 (Neb. 1984)).

[642] *Id.* at 1454-55.

States in *Finley v. United States*.[643] The United States District Court for the Southern District of California, summarizing the information available to an approach controller, concluded that there was *no evidence* the controller had any knowledge that the pilot had deviated from the published altitudes on the ILS approach to Montgomery Field in San Diego, California, during a night approach under minimum conditions.[644] The NTAP data available from Los Angeles center, which was retrieved after the accident, but which was not available to the San Diego approach controller, indicated that the aircraft intentionally descended well below the published altitudes before reaching the outer marker of the ILS localizer course. This was done before in an apparent attempt to avoid a higher cloud level. During this time, the approach controller would not have received any altitude information on the aircraft, and the low altitude warning system, which is actuated by data available to the approach controller on the ARTS III Approach Control radar systems, would not have alerted the air traffic controller to an unusually low altitude. The absence of an altitude readout in that location would not have been unusual because of the terrain in that area. The controller switched the pilot to the airport advisory radio frequency and no longer communicated with the pilot. The pilot intercepted the ILS localizer, climbed to intercept the glide slope, and proceeded on the glide slope toward the airport. Within two miles of the airport, the pilot suddenly descended 500 feet below the glide slope, impacted power lines, and crashed. Again, the approach controller had not been in contact with the aircraft during this time. Furthermore, the final descent was shown on only one radar return recorded by the NTAP data, leading to the conclusion that the descent was a sudden deviation from the glide slope.

The *Finley* court concluded that the air traffic controller had met all requirements to provide proper clearances and

---

[643] No. 86-1151-S(M), 1993 U.S. Dist. LEXIS 18949 (S.D. Cal. May 4, 1993).

[644] *Id.* at *27.

information to the pilot based upon known information.[645] Furthermore, even if the controller had been negligent, the Court concluded that the pilot intentionally deviated from the published altitudes and that the pilot's negligence was the sole proximate cause of both the crash and the deaths of the passengers for which the claims involved in this case had been asserted.[646] The pilot was not relying upon any information from the approach controller at that point in the approach after switching to the advisory frequency, and, therefore

> [a]ny failure of an air traffic controller to warn a pilot that he is below the proper altitude cannot be regarded as a proximate cause of an accident when the pilot is aware that he is below the proper altitude, recognizes the danger in being below the proper altitude, and decides to proceed.[647]

The court entered judgment in favor of the United States.[648]

C. MISCELLANEOUS

The liability of the federal government for damages due to an automobile accident that occurred as a result of efforts to avoid a collision with a low-flying military airplane was the subject of *Bunch v. United States.*[649] The government argued that military aircraft were flown by persons other than the United States government in Nevada, but the court concluded that, while positive identification of the aircraft was not possible, the insignia on the aircraft and the appearance of the aircraft supported the district court's finding that the aircraft involved was a U.S. military aircraft.[650] The plaintiff suffered serious injuries and a miscarriage. The miscarriage actually occurred following a pregnancy after the accident, but the court concluded that

---

[645] *Id.* at *43-44.

[646] *Id.*

[647] *Id.* at *44.

[648] *Finley*, 1993 U.S. Dist. LEXIS 18949 at *44.

[649] No. 92-15310, No. 92-15332, 1993 U.S. App. LEXIS 12103 (9th Cir. May 13, 1993) (unpublished opinion reported as a table case at 993 F.2d 881).

[650] *Id.* at *2-3.

plaintiff's physical condition which led to the miscarriage was "directly attributable to the accident."[651]

VI. AIRPORTS

The liability of an airport operator for damage to an aircraft engine resulting from the need to suddenly reverse thrust on a snow and ice covered taxiway in order to avoid ground equipment was presented in *Pan American World Airways, Inc. v. Port Authority of New York.*[652] The trial court had entered judgment against plaintiff Pan American as a matter of law pursuant to Federal Rule of Civil Procedure 50(A)(1) following the close of evidence. The Second Circuit Court of Appeals reversed, finding that the record clearly could have supported a verdict in favor of Pan American.[653]

The Pan American DC-10 was operating on a taxiway at JFK International Airport under conditions of heavy fog. The taxiways were reported to be "very slippery." The New York Port Authority had sand trucks in the vicinity of the taxiway. The air traffic controller advised the Pan American aircraft of the presence of the sand trucks and advised the aircraft to yield to the sand trucks.

The flight crew testified that as the aircraft approached the sand trucks, the sand trucks suddenly accelerated out into the path of the aircraft, although the captain and the first officer could not agree on the direction from which the trucks had come. The evidence also conflicted as to the speed of the aircraft. The aircraft crew members stated that they were going between three and five miles an hour, whereas the defendant's expert opined that the aircraft was travelling between fifteen and twenty miles per hour.

Pan American contended that judgment should not have been entered as a matter of law because a question of fact existed as to whether the taxiway had been properly main-

---

[651] *Id.* at *4.

[652] Pan Am. World Airways, Inc. v. Port Auth. of New York & New Jersey, 995 F.2d 5 (2d Cir. 1993).

[653] *Id.* at 10.

tained, i.e., whether it should have been sanded before the incident or closed all together. Pan American also argued that fact questions remained regarding whether the sand trucks had violated a New York State law that requires ground equipment to yield the right-of-way to aircraft (notwithstanding the air traffic controller's advisory).

The Second Circuit Court of Appeals held that the Port Authority's duty "encompassed more than an obligation to warn" aircraft of the dangerous conditions.[654] If the conditions were too dangerous, then a jury could conclude that the taxiway should have been closed or properly maintained.[655] The court further concluded that, given the testimony of the Pan Am flight crew as to the speed of the aircraft and the sudden appearance of the sand trucks in the path of the aircraft, a jury could reasonably conclude that the sand truck operators, who may not have been aware of the air traffic controller's warning to the aircraft, were negligent.[656] The court stated that

> [c]ontrary to the Port Authority's suggestion, the instructions [to the aircraft to yield the right-of-way to the ground crew] would not permit the trucks to cut off the aircraft. Because this sequence of events would permit a jury to conclude the Port Authority negligently operated its trucks, we find the district court erred in granting the Port Authority's motion for judgment as a matter of law.[657]

Finally, although the Second Circuit reversed the district court's entry of judgment as a matter of law, the court affirmed the district court's discretion in refusing to allow Pan Am's accident reconstruction expert to testify.[658] The court concluded that the expert did not have the requisite air traffic control training, had little experience at large airports, had no familiarity with the ground procedures at JFK, and had only been an accident investigator for the NTSB

---

[654] *Id.* at 9.

[655] *Id.*

[656] *Id.*

[657] *Pan Am. World Airways*, 995 F.2d at 9.

[658] *Id.* at 10.

for eighteen months.[659] Accordingly, the trial court did not err in refusing to allow the expert to testify, although the expert had previously testified on behalf of the Federal government and on behalf of others in federal court litigation.[660]

Claims against an airport operator for closing a cross-wind runway and allegedly closing the tower several minutes prior to its scheduled midnight closing, thereby depriving the pilot of wind information, were subject to summary judgment in *Berends v. City of Atlantic City*.[661] In a detailed factual review of the cross-wind landing accident, the court affirmed summary judgment in favor of Atlantic City, Pan American World Airways, Inc. (the airport operator), and International Technical Aviation Personnel, Inc. (the control tower operator).[662]

The court concluded that due to prior safety concerns relating to operations on a short cross-wind runway, the closure of such a runway was not unreasonable and neither Atlantic City nor Pan Am incurred any liability arising from the closure of the runway.[663] The plaintiff also alleged that the control tower operators had left shortly before midnight, thereby depriving the pilot of wind information. The court rejected this allegation on the grounds that there were other sources of wind information available to the pilot, including reports from a nearby airport.[664] Moreover, the pilot of the aircraft also would detect the high cross-winds during the course of the approach.[665] If the pilot was uncomfortable about landing on the cross-wind runway

---

659 *Id.*

660 *Id.*

661 621 A.2d 972 (N.J. Super. Ct. App. Div. 1993).

662 *Id.* at 982.

663 *Id.* at 980-82. Under N.J. STAT. ANN. § 59:4-2 (West 1992), a municipality's sovereign immunity is not waived if the failure to take action against a dangerous condition is "not palpably unreasonable." The court also based its decision on N.J. STAT. ANN. § 59:2-3a (West 1992), which provides that there is no liability for "an injury resulting . . . [from] 'high-level policy making decisions involving the balancing of competing considerations.'" *Id.*

664 *Id.* at 982.

665 *Id.*

without wind direction velocity, then he could have landed at another airport.[666] Notably, the court quoted from *In re Air Crash at Dallas/Fort Worth Airport*,[667] stating "[t]he better choice is represented by the standard pilot's maxim . . . 'If in doubt, get out.'"[668]

VII. PRACTICE AND PROCEDURE

A. CONTRIBUTION AND INDEMNITY

In *Borg-Warner Corp. v. Avco Corp.* the Alaska Supreme Court considered the contribution claims of Borg-Warner against Avco Corporation and Piper Aircraft Corporation.[669] The case arose from a wrongful death action involving a 1986 accident on the North Slope of Alaska. The wrongful death action was originally filed against Borg-Warner, the carburetor manufacturer, and Edward DePriestan an aircraft mechanic. None of the parties sought a jury trial.

Shortly before trial, Borg-Warner moved to add third-party claims for contribution against Avco, Piper, Rogers Corporation (the carbon float manufacturer) and Peterson Aircraft (the holder of an auto-gas Supplemental Type Certificate). After each defendant was joined, Borg-Warner attempted to have the contribution claims tried in the first trial. The third-party defendants objected, and the trial of plaintiff's wrongful death claims proceeded against Borg-Warner alone.

In its findings of fact and conclusions of law, the trial court found that the legal cause of the accident was a defective carburetor and that the use of auto-gas did not contribute to the absorption of fuel by the float.[670] The court also concluded that Borg-Warner had concealed a manufacturing defect and that such concealment was "outrageous con-

---

[666] *Id.*

[667] 919 F.2d 1079, 1087 (5th Cir.), *cert. denied*, 112 S. Ct. 276 (1991).

[668] *Berends*, 621 A.2d at 982.

[669] Borg-Warner Corp. v. Avco Corp., 850 P.2d 628 (Alaska 1993).

[670] *Id.* at 630-31.

duct and a reckless disregard of the rights of others."[671] The court found Borg-Warner at least fifty percent at fault and, therefore, jointly and severally liable for $1.6 million in compensatory damages and $5 million in punitive damages.[672] The court did not allocate specific percentages of fault to any of the third-party defendants.[673]

Following the trial court's decision, but before entry of judgment, Borg-Warner and Swanson settled for approximately $4.5 million, and the Swanson claims against Borg-Warner were dismissed. Borg-Warner unsuccessfully moved for the withdrawal of the court's findings of fact and conclusions of law. The third-party defendants moved for summary judgment on the grounds that Borg-Warner was not entitled to contribution as a "willful and wanton tortfeasor" and was collaterally estopped from relitigating the issue. The court granted Avco's and Piper's motions but denied Rogers' motion because an issue existed as to whether Rogers' conduct may have been as culpable as Borg-Warner's.[674]

On appeal, Borg-Warner first raised the propriety of separate trials, particularly where it was necessary to allocate fault among the parties in accordance with Alaska's Tort Reform Act.[675] The court held that, while one complete and comprehensive hearing is preferable where complex issues are intertwined, separate trials of third-party claims may be ordered in order to avoid prejudice.[676] The court noted that Borg-Warner did not attempt to add the third-party defendants until three months before the scheduled trial date and that a single trial would have "significantly delayed" the Swanson wrongful death trial.[677]

The court next addressed the trial court's determination that Borg-Warner was not entitled to contribution because

---

671 *Id.*
672 *Id.* at 631 n.4.
673 *Id.*
674 *Borg-Warner Corp.*, 850 P.2d at 631 n.4.
675 ALASKA STAT. § 09.17.080 (1986).
676 *Borg-Warner Corp.*, 850 P.2d at 632.
677 *Id.*

its conduct had been "willful and wanton." Alaska has adopted the Uniform Contribution Among Joint Tortfeasors Act,[678] but in so doing deleted the restriction on contribution for those parties who have been guilty of willful or wanton misconduct.[679] Instead, the Alaska version of the Uniform Contribution Among Joint Tortfeasors Act only precludes contribution in those cases in which a tortfeasor has "intentionally caused or contributed to an injury or wrongful death."[680]

Additionally, the Alaska Supreme Court looked to other state authorities which dealt with the issue of contribution claims by a party who is guilty of willful or wanton misconduct. The court noted that the allocation of fault under both the Alaska Tort Reform Act and the doctrine of comparative negligence as adopted in other states "directs the trier of fact to consider 'the nature of the conduct of each party at fault,' as well as the degree of causal tie between the conduct and the damages claimed."[681] As such, in determining the allocation of fault for purposes of contribution, the willful and wanton character of the misconduct would be considered by the trier of fact in determining the proper allocation of fault.

Finally, the court addressed Borg-Warner's argument that it was not collaterally estopped from relitigating the trial court's findings "concerning the nature of its conduct toward [the deceased pilot]." Under Alaska law, mutuality of parties is not required in order to support a claim of collateral estoppel, and the claim of collateral estoppel may apply under the following circumstances:

1. The plea of collateral estoppel must be asserted against a party or one in privity with a party to the first action;
2. The issue to be precluded from relitigation by operation of the doctrine must be identical to that decided in the first action; and

---

[678] ALASKA STAT. § 09.16.010(c) (1986).

[679] ALASKA STAT. § 09.16 (repealed 1989).

[680] *Borg-Warner Corp.*, 850 P.2d at 633.

[681] *Id.*

3. The issue in the first action must have been resolved by final judgment on the merits.[682]

The Alaska Supreme Court noted that there was no question that the parties and the issues were identical. Instead, the question was whether the trial court's memorandum decision was sufficiently final for purposes of collateral estoppel.[683] The court noted the Restatement (Second) of Judgments, Section 13, which states that a final judgment is not necessary if "any prior adjudication of an issue in another action . . . is determined to be sufficiently firm to be accorded conclusive effect."[684]

The court agreed that entry of a final judgment was not necessary and relied upon a Fifth Circuit decision, *Chemetron Corp. v. Business Funds, Inc.*,[685] to support its view that a memorandum decision, filed prior to the parties' settlement and before entry of final judgment, was to be given preclusive effect.[686]

The Alaska Supreme Court determined that the proper test was whether the issue has been "fully litigated."[687] The court determined that the trial court's seventy-four page memorandum decision and its findings were necessary and essential to the trial court's decision.[688] The court held that it was hard to imagine any case more "fully litigated" in the absence of the final judgment.[689] Accordingly, the court held that Borg-Warner was precluded from relitigating the nature of its conduct, but held that it was not bound by the trial court's finding that it was more than fifty percent at fault.[690] The issue of relative fault between Borg-Warner and the third-party defendants was not properly before the

---

[682] *Id.* at 634.

[683] *Id.*

[684] RESTATEMENT (SECOND) JUDGMENTS, § 13 (1982).

[685] 682 F.2d 1149 (5th Cir. 1982), *vacated and remanded*, 460 U.S. 1007 (1983).

[686] *Borg-Warner Corp.*, 850 P.2d at 635.

[687] *Id.*

[688] *Id.*

[689] *Id.* at 636.

[690] *Id.*

trial court in the wrongful death trial and could be relitigated in the contribution case against Avco and Rogers.[691]

The Michigan Court of Appeals in *Whitesell v. Zantop International Airlines, Inc.*[692] considered a summary judgment for express indemnity in an aircraft sales contract between the seller Eastern and the purchaser Zantop. The court previously had entered a default judgment against Zantop and dismissed Zantop's contribution claims.[693] As to Eastern's claims against Zantop, however, the appellate court reviewed the summary judgment entered in favor of Eastern and held that the indemnity agreement should be construed in accordance with its terms, which called for the application of Florida law.[694] Pursuant to Florida law, an indemnity agreement that is not "clear and unequivocal" on its face in providing indemnification against a party's own negligence will not be enforced.[695] The court held that Eastern Airlines had admitted its own negligence in establishing that it was not a "volunteer" in making initial payments to plaintiff Whitesell and, as such, Eastern would not be entitled to indemnification for its own negligence under the terms of the sales contract as interpreted in accordance with Florida law.[696] Accordingly, the appellate court reversed the summary judgment in favor of Eastern and against Zantop on the issue of express contractual indemnity under the sales contract.[697]

---

691 The court noted that Piper Aircraft Corporation had filed Chapter 11 bankruptcy in July 1991 and, therefore, would not be a party to the further proceedings. *Borg-Warner Corp.*, 850 P.2d at 631. Nevertheless, the issue of whether Piper's fault, if any, should be included in the allocation for purposes of contribution may be important in determining the remaining percentages of fault against the other third-party defendants and whether any of them are "jointly and severally" liable. Also, an issue exists as to whether any party held "jointly and severally" liable can be required *to contribute* any part which may be allocated to Piper but not paid due to the bankruptcy. *Id.* at 630.

692 503 N.W.2d 915 (Mich. Ct. App. 1993).

693 *Id.* at 918. *See infra* note 745 and accompanying text.

694 *Id.* at 919.

695 *Id.* at 922.

696 *Id.* at 917.

697 503 N.W.2d at 917.

B. MANDAMUS

In *George Kabeller, Inc. v. Busey*[698] the Eleventh Circuit Court of Appeals reviewed the dismissal of a mandamus action filed by Zephyr Hills Parachute Center against the Federal Aviation Administration (FAA) for failure to issue a final order with regard to its complaints of discrimination by the City of Zephyr Hills in violation of the Federal Aviation Act. On October 16, 1990, the plaintiff had requested that the FAA review certain actions on the part of the City of Zephyr Hills in granting a more favorable lease to a competing skydiving business, which he contended discriminated against it in violation of the Federal Aviation Act. Over the next fourteen months, the action was reviewed at various local, regional and national levels by the FAA but was not complete.

Kabeller filed an action in the U.S. District Court for the Northern District of Georgia for a writ of mandamus requiring the FAA to take action. The FAA moved to dismiss on the grounds that 49 U.S.C. § 1486(a) vests exclusive jurisdiction for review of FAA actions in the U.S. circuit courts of appeal. Kabeller also argued, alternatively, that if the district court did not have jurisdiction, then the action should be transferred to the Eleventh Circuit Court of Appeals.

The district court concluded that the FAA was correct in its assertion that the federal circuit courts of appeal had exclusive jurisdiction over the FAA, including the issuance of any writs that would be necessary to aid their "future jurisdiction."[699] The district court and the Eleventh Circuit Court of Appeals rejected the argument that the absence of a "final order" precluded application of the exclusive jurisdiction statute.[700] Instead, both courts concluded that the All Writs Act provided a basis for seeking relief in the Eleventh Circuit Court of Appeals in aid of its "future jurisdiction."[701]

---

[698] George Kabeller, Inc. v. Busey, 999 F.2d 1417 (11th Cir. 1993).
[699] *Id.* at 1419-20.
[700] *Id.* at 1421-22.
[701] *Id.*

Finally, the district court had concluded that transfer to the Eleventh Circuit Court of Appeals was not "in the interest of justice," because the case did not present extraordinary circumstances to justify mandamus.[702] Two of the three judges of the Eleventh Circuit Court agreed, and the court held that "even if jurisdiction were to properly reside with the court at this point in time, [the court] conclude[s] that the drastic remedy of mandamus is inappropriate."[703]

C. Proper Party in Interest

In *Reliant Airlines, Inc. v. County of Broome*[704] the district court addressed the issue of whether an insurer was required to join the lawsuit as a real party in interest in a subrogation property damage claim. Defendants moved to dismiss the claim by Reliant Airlines, Inc. or, in the alternative, to have Reliant's insurer, U.S. Fire Insurance Company, named as a real party in interest pursuant to Federal Rule of Civil Procedure 17(a). Prior to a ruling on the defendants' motions, Reliant filed a "ratification of the action by U.S. Fire stating that U.S. Fire has agreed to be bound by the decision of the court,"[705] accompanied by a supporting affidavit that stated that the general agent underwriting the policy and the corporation adjusting the claim agreed to be bound by the action. Notwithstanding the defendants' arguments that under New York state law only the insurer was the proper party in interest, the federal court held that the real party in interest under the Federal Rules of Civil Procedure was a procedural matter and that Rule 17(a) expressly excepted the real party in interest from joinder in event that there had been a ratification by the insurer.[706] The court noted that the decision whether to accept the ratification was a decision with in the discretion of the trial court; however, the court noted that the ratification was satisfac-

---

[702] *Id.* at 1422.
[703] *Busey*, 999 F.2d at 1422.
[704] No. 90-CV-537, 1993 U.S. Dist. LEXIS 10,110 (N.D.N.Y. July 16, 1993).
[705] *Id.* at *4.
[706] *Id.*

tory in this case thus denying the motion to dismiss or, alternatively, to add U.S. Fire as a real party in interest.[707]

D. Evidence and Trial Practice

The case of *Van Steemburg v. General Aviation, Inc.*[708] arose from the crash of a single-engine Cessna 182 RG aircraft on October 20, 1992. The pilot was killed in the crash. The plaintiff was a passenger aboard the aircraft who was severely injured. The defendant, Robertson Transformer Corporation of Indiana, Inc. (RTCI), owned the aircraft, and the defendant, TK Aviation, Inc., an aircraft rental facility at Chicago Midway Airport, operated the aircraft. General Aviation, Inc. (GAC), a licensed repair facility, maintained the plane.

The plaintiff contended that the accident occurred due to an engine failure resulting from eroded spark plugs that GAC had failed to replace during the last annual inspection prior to the crash. The defendants contended that the accident was not due to an engine malfunction but rather to the pilot flying in known icy conditions. At the close of the plaintiff's case, the trial court directed a verdict in favor of defendants TK and RTCI, and the jury returned a verdict in favor of defendant GAC and against the plaintiffs.[709] The Illinois Court of Appeals reversed the judgment in favor of GAC and remanded the case for a new trial.[710]

Specifically, the court of appeals found that the trial court had committed error by permitting the opinions of NTSB investigators to be introduced as substantive evidence in the case.[711] The evidence was introduced during the cross-examination of the plaintiff's experts when they were asked whether the NTSB investigators found any evidence of pre-impact power loss and whether the NTSB investigators noted only one emergency condition with respect to

---

[707] *Id.* at *8.
[708] 611 N.E.2d 1144 (Ill. App. Ct. 1993).
[709] *Id.* at 1148.
[710] *Id.* at 1167.
[711] *Id.* at 1155.

the aircraft, namely air frame icing. The court rejected GAC's argument that, because the experts had relied upon the NTSB reports or portions thereof related to ice, the "door had been opened" as to the opinions of the NTSB investigators.[712]

The trial court had initially ruled that the opinions of the NTSB investigators were not admissible because they were based largely on information derived from secondary sources rather than upon personal knowledge. The court concluded that the plaintiff's experts reasonably could have relied upon the factual observations noted in the NTSB report, even though hearsay, but not any opinions. The appellate court, however, concluded that the NTSB investigators' opinions were based upon hearsay (double hearsay) and that it was error to disclose those opinions to the jury, even via cross-examination.[713] The court noted that cross-examination of the plaintiff's experts might have been conducted by simply showing that the plaintiff's experts relied only upon the factual observations in the report, which were not in dispute, in dispelling any implication that the NTSB report contained any opinions that corroborated or were consistent with those of the plaintiff's expert.

The appellate court also determined that the failure to allow a passenger who was on a prior flight to explain her lack of concern about using the aircraft on the accident flight was error.[714] The defendants had filed a motion in limine to exclude the witness' testimony regarding her recollection of the prior flight, but on cross-examination, defense counsel asked: "you didn't have any concern about getting back in that same plane, did you?"[715] The plaintiff's counsel argued that the defense counsel had "opened the door," but the court refused to allow her to testify as to why

---

[712] *Id.*
[713] *Van Steemburg*, 611 N.E.2d at 1156.
[714] *Id.* at 1157.
[715] *Id.* at 1156.

she had no concern about getting back into the plane.[716] In her pretrial deposition, the witness had testified that the reason she was willing to get in the airplane was because she had been told by the pilot that he had called "that place about the plane" to discuss the problems which they had encountered in the prior flight.[717] The appellate court agreed that such a report was hearsay and also was too indefinite to even indicate notice to anyone of any particular problems.[718] However, having created the implication that the passenger was not concerned about the prior problems and, therefore, was willing to take the accident flight, the court of appeals held that the defendant had opened the door to her explanation as to her state of mind and that such testimony, therefore, should have been admitted.[719]

The court of appeals also concluded that the trial court erred in refusing to instruct the jury as to the failure of the defendant to produce its piloting expert and its weather expert.[720] The defendants contended that such testimony was merely cumulative and, therefore, unnecessary. The plaintiff, on the other hand, contended that the testimony of these experts would have supported their position and that they should have been permitted to comment on the failure of these experts to testify. The appellate court held that, unless the defendants have "offered a reasonable explanation for failing to call its experts," the plaintiff should have been permitted to comment on the experts' absence.[721]

---

[716] *Id.*

[717] *Id.*

[718] *Van Steemburg*, 611 N.E.2d at 1156.

[719] *Id.*

[720] *Id.*

[721] *Id.* at 1158. Incredibly, the appellate court held that the pilot expert should have been called by the defendant, so that the "plaintiffs should have had an opportunity to cross-examine [him] to bring out any weaknesses in [his] theory." *Id.* Inasmuch as the defendant's experts did not testify during the course of defendant's evidence and his theory apparently, therefore, was not in evidence, it is difficult to understand how the plaintiff was prejudiced by being denied the right to cross-examine an expert who had not yet even given any testimony in the case. *Id.*

The court held that directed verdicts in favor of the owner and operator of the aircraft should be affirmed on the grounds that there was no circumstantial evidence which would support a finding that either the owner or the operator had notice of any prior problems with the aircraft.[722] The testimony of numerous other reputable pilots and other mechanics who had flown the airplane indicated that there had been no mechanical problems reported, despite the apparent eroded condition of the spark plugs. The appellate court also held that the trial court did not err in allowing evidence of certain spark plug tests conducted after the accident; in refusing to allow evidence of another TK Aviation aircraft accident approximately 15 months before involving "fouled" spark plugs; in allowing the defendant to cross-examine the plaintiff as to her prior deposition testimony; and in properly allowing a transcript of ATC communications to be introduced into evidence in which the controller stated to the pilot that there was "heavy ice all over the area."[723] Notably, the appellate court concluded that the ATC transcript (and its contents) were not hearsay because the ATC transcript was a business record.[724] Interestingly, the appellate court followed a Second Circuit decision which had held that: "a recording of the kind at issue here is 'part of a regular air control procedure [and is] at least the equivalent of a regular written journal kept by the [air traffic controller] and as such [is] a contemporaneous business record."[725] Even though the information which the controller was relaying was based upon information received from "unnamed pilots," such information was related by the pilots as a part of their "regular practice to report to ATC specific weather conditions which they observed in the course of their flights."[726]

---

[722] *Van Steemburg*, 611 N.E.2d at 1160.

[723] *Id.* at 1161-66.

[724] *Id.* at 1165.

[725] *Id.* at 1166 (quoting from LeRoy v. Sabean Belgian World Airlines, 344 F.2d 266, 373 (2d Cir.), *cert. denied* 382 U.S. 878 (1965)).

[726] *Id.*

Finally, the court held that it was not error for the trial court to have refused to instruct the jury on the requirements of maintenance in accordance with the manufacturer's maintenance manual pursuant to the Federal Aviation Regulations. These regulations require that "each person performing maintenance, alteration or preventative maintenance on an aircraft . . . shall use the methods, techniques and practices prescribed in the current manufacturer's maintenance manual."[727] The trial court held that there was no evidence as to what the current manufacturer's maintenance manual required in connection with the replacement of spark plugs at the annual inspection; however, there was other testimony "as to what [the repair facility] requires its mechanics to refer to when inspecting spark plugs."[728]

The admissibility of an expert witness's prior purported inconsistent statement for purposes of impeachment and counsel's argument relating thereto were the subjects of the decision in *Lentomyynti Oy v. Medivac, Inc.*[729] In that case, the plaintiffs appealed a defense verdict on the grounds that, following the grant of defendant's motion in limine to exclude certain testimony of plaintiffs' expert. The plaintiffs chose not to call the expert as a witness at trial. During the defense, however, the defendant read into evidence certain portions of the deposition testimony of the challenged expert. In so doing, the defense counsel was warned not to "open the door" to the excluded theory. In response to the plaintiffs' insistence that the remainder of the deposition testimony be read, the trial court allowed the plaintiffs to read every additional passage they desired from the deposition. It is not clear, however, whether at that point any portion of the deposition involving the excluded theory was read into evidence.

The plaintiffs then chose to call the expert witness who had not testified on the plaintiffs' case-in-chief as a rebuttal

---

[727] *Van Steemburg*, 611 N.E.2d at 1166.

[728] *Id.*

[729] 997 F.2d 364 (7th Cir. 1993).

witness to rebut a theory espoused by the defendant's expert. On cross-examination of the plaintiffs' expert, the defense counsel cross-examined him with a discovery statement, under Federal Rule of Civil Procedure 26, in which the excluded theory had been espoused as the cause of the accident. Additionally, counsel also challenged the plaintiffs' expert on the grounds that in his deposition testimony prior to trial he had given "an entirely different opinion."[730] As a result of this cross-examination, the trial court concluded that defense counsel had opened the door and then allowed all of the formerly excluded testimony to be presented to the jury.[731]

On appeal, the plaintiffs contended that defense counsel had opened the door only to enable the defense to argue that the plaintiffs' expert had given two inconsistent theories on the cause of the accident, and the plaintiffs' theories, therefore, could not be believed.[732] The Seventh Circuit held that the initial introduction and use of the plaintiffs' expert's deposition testimony had been proper and also that the subsequent impeachment on the apparently "inconsistent" statements was proper.[733] In examining the statements, the court concluded that the statements "seem inconsistent . . . [c]ertainly inconsistent enough to justify inquiry into them during cross-examination."[734] Having concluded that cross-examination into the purportedly inconsistent statements was proper, the court then concluded that defense counsel's closing argument that the statements were inconsistent was also improper.[735] Finally, the court noted that the plaintiffs had not argued to the jury that the reason they had not called their expert during their case-in-chief was due to the court's order. Additionally, the plaintiffs had not requested an instruction from the court to the jury explaining that such testimony had

---

[730] *Id.* at 372.
[731] *Id.*
[732] *Id.* at 373.
[733] *Id.* at 372-73.
[734] *Lentomyynti Oy*, 997 F.2d at 373.
[735] *Id.*

been excluded.[736] Based upon the finding that defense counsel's use of the deposition testimony, impeachment and argument were proper, the defendant's verdict and judgment were affirmed.[737]

In *Combined Communications Corp., Inc. d/b/a KUSA-TV v. Public Service Co.*,[738] the Colorado Court of Appeals affirmed a judgment in favor of plaintiff Combined Communications Corporation and the spouses of the deceased pilot and passenger of a helicopter arising from a wire-strike accident involving cables in excess of 200 feet in height. In so doing, the court considered several significant evidentiary issues. First, the court considered defendant PSC's argument that evidence of post-accident remedial measures was not admissible, even though the measures were taken as a result of another prior accident. The court rejected that argument, noting that post-accident remedial measures refer to the accident involving injury to the plaintiff and not to other accidents.[739] The court further noted that the post-accident remedial measures included notice to the Federal Aviation Administration and consultation regarding the marking of the precise cables involved in this accident with orange aviation balls, and if defendant PSC had notified the FAA as it had been required by law to do in the first instance, the cables would have been marked with orange aviation balls even before the first accident.[740]

The court also rejected defendant PSC's argument that the then existing version of the "good samaritan" statute applied.[741] Under the statute, no duty would be assumed if a person performs an act of assistance without compensa-

---

[736] *Id.* at 374. Indeed, the Seventh Circuit noted that the plaintiffs may have made a tactical decision that they did not want the jury to be told that the testimony, once submitted to the jury for their consideration, formerly had been held inadmissible on the grounds that the plaintiff's expert lacked the medical competence to make such opinion testimony admissible in the first instance. *Id.*

[737] *Id.*

[738] 865 P.2d 893 (Col. Ct. App. 1993).

[739] *Id.* at 896.

[740] *Id.*

[741] COLO. REV. STAT. § 13-21-116 (1987).

tion for the benefit of another.[742] The court held that PSC was under a duty to warn of a dangerous condition it had created in the form of wire cables, and this common law duty did not arise under the "good samaritan" statute.[743]

The court also rejected PSC's argument that certain evidence should be excluded under the "self-critical analysis" privilege.[744] The court held that, even if such privilege exists, it does not protect against the discovery of information developed by routine, internal corporate review of matters relating to safety engaged in prior to the incident.[745] The court stated the following:

> This is so because, while post-accident investigations might be discouraged if no privilege were recognized, general pre-accident safety reviews: "are designed to preempt litigation; it is perverse to assume that candid assessments necessary to prevent accidents will be inhibited by the fear that they could later be used as a weapon in hypothetical litigation they are supposed to prevent."[746]

Finally, the court noted that any such privileged information must be treated as confidential by the parties, and any communications with the Federal Aviation Administration could not be treated as confidential because they were part of the agency's public files.[747]

E. Limitation of Actions

In *Phillips v. Heine*[748] the representatives of a passenger who was aboard a flight which disappeared off the coast of Italy were not entitled to claim that the statute of limitations under the Death on the High Seas Act was tolled pending the issuance of a death certificate. Under California law, a death certificate could not be issued more than

---

[742] *Id.*

[743] *Combined Comm. Corp.*, 865 P.2d at 897.

[744] *Id.* at 898.

[745] *Id.*

[746] *Id.* at 897 (quoting Dowling v. American Haw. Cruises, Inc., 971 F.2d 423, 427 (9th Cir. 1992)).

[747] *Id.* at 898.

[748] Phillips v. Heine, 984 F.2d 489 (D.C. Cir.), *cert. denied*, 114 S.Ct. 285 (1993).

two years after the disappearance. Nevertheless, the court held that the date of disappearance of the aircraft would be presumed to be the date of death and that the statute of limitations begins to run at that time.[749] Under the Death on the High Seas Act, certain persons could have filed suit at any time after the date of disappearance, and, therefore, that date would be the date that "identified persons for whose benefit the liability exists and who can start the machinery of law in motion to enforce it, by applying for the appointment of an administrator," may do so.[750] Later, once an administrator was appointed, the complaint could be amended to name the administrator as a party.[751] Similarly, the court held that "if the accrual of the cause of action starts at death rather than the appointment of an administrator for the plaintiff's decedent, it surely does not await a formal finding of death, as in the issuance of a death certificate."[752] The court concluded that if it permitted any tolling or delay based upon the fact that an administrator had not yet been appointed or upon the fact that a death certificate had not yet been obtained, then that exception would replace the definite limitations period established under the Death of the High Seas Act with an indefinite and unlimited statute of limitations.[753]

Finally, the court considered the doctrine of equitable tolling and ruled that the newly-appointed conservator had three weeks within which to file a wrongful death action before the statute expired.[754] The court stated the following:

> [N]othing had prevented plaintiff from gathering information in the preceding years, and more than three weeks remained, we question whether there was any need to extend the statute at all. But plaintiff's reasonable needs surely did not require extending the time a full nine and one-half

---

[749] *Id.* at 490.
[750] *Id.* at 491.
[751] *Id.*
[752] *Id.*
[753] *Phillips*, 984 F.2d at 491.
[754] *Id.* at 492.

> months that passed before he filed suit on December 12, 1990.[755]

The court specifically noted that a prior version of the statute, which explicitly permitted tolling, extended the period for only 90 days after the end of the tolling event.[756] The court stated the following:

> When Congress extended that statutory period from two years to three and deleted any reference to tolling, we doubt it meant to allow plaintiffs more than 90 days from correction of the tolling event, at least in the absence of some extraordinary factor that would make so long an extension reasonable.[757]

F. SANCTIONS

In *Zantop International Airlines, Inc. v. Eastern Airlines*[758] the Michigan Court of Appeals reviewed entry of a default judgment against Zantop International Airlines as a result of the conduct of its counsel during the course of trial. The jury entered a verdict in favor of plaintiff and against Zantop in the amount of $2,000,000. Additionally, Zantop had filed claims for contribution against Eastern Airlines, Lockheed Corporation, and Bendix Corporation for $2,000,000 which it had paid to the estates of the other four persons on board the aircraft. Such claims were dismissed as a result of counsel's conduct.

With respect to the issue of the default and dismissal of Zantop's claims, such dismissal was based upon Zantop's counsel's questions in violation of the court's order on a motion in limine precluding any reference to a particular post-accident service letter. Specifically, during trial, Zantop's attorney asked the witness, "You were involved in OIL24, weren't you, sir?"[759] OIL24 is "operating information letter number 24," which was the subject of the pretrial

---

[755] *Id.* at 491.
[756] *Id.*
[757] *Id.*
[758] 503 N.W.2d 915 (Mich. App. 1993). *See supra* note 679.
[759] *Id.* at 918.

order on the motion in limine.[760] The trial court noted that default and dismissal were unusually harsh sanctions, but stated that the record demonstrated that Zantop violated many pretrial orders, which are cataloged in the decision, culminating in a pretrial sanction of penalties and attorneys' fees of $25,000.[761] The court summarized its conclusions as follows:

> Lockheed and Bendix argue quite correctly that the court was able to remedy many of the abuses, but was unable to deter them. Zantop's argument on appeal attempts to isolate OIL24 by saying the trial court's decision to dismiss was based solely on that violation. In fact, there was a history of significant and frequent violations, and raising "OIL24" in front of the jury was the last straw. Although in a long and complex case there is more opportunity for error to occur — and mindful of the drastic nature of the penalty imposed — the history of this case shows that the trial court did not abuse its discretion when "all else having failed" it executed the "death penalty" to Zantop's case.[762]

The propriety of an award of sanctions under Federal Rule of Civil Procedure 11 was the subject of the district court's decision in *Custer v. Bay View Federal Bank*.[763] The plaintiff's attorney filed suit against Bay View Federal Bank for failure to comply with a Beech Aircraft service bulletin, which allegedly permitted a malfunction of the fuel selector valve resulting in fuel starvation and the fatal crash involved in this case. Bay View contended that it had sold the airplane to its former Chairman of the Board at the time of his resignation two months prior to the issuance of the service bulletin.

The plaintiff's attorney was unable to support with any documentation his contention that prior to suit he had been informed that the aircraft had been used by defendant's chairman for bank business after title to the aircraft

---

[760] *Id.*

[761] *Id.* at 924.

[762] *Id.*

[763] No. C-93-1788 MHP ENE, 1993 U.S. Dist LEXIS 14,468 (N.D. Cal. Oct. 12, 1993).

was transferred. Upon the filing of suit, defendant Bay View informed plaintiff's counsel that the suit was barred under California's one year statute of limitations for wrongful death actions (even though the accident occurred in Texas) and also that the aircraft had never been used for bank business. This contention was supported by a declaration from the bank's "legal representative," who stated that he had told plaintiff's counsel that the aircraft was never used for bank business and was sold to the chairman when he resigned as Chairman of the Board at Bay View.[764] Plaintiff's attorney either was unable or failed to counter this specific allegation with any declaration to the contrary.

The court concluded that Rule 11 sanctions should be granted based upon the objective standard of whether a pleading, motion, or other paper is "frivolous or interposed for an improper purpose," and the standard of "objective reasonableness at the time of the attorney's signature."[765]

The court concluded that, although the claim was warranted by existing law, it was not well grounded in fact in that there was no evidence to support plaintiff's counsel's contention that he had been told by the bank's legal representative that the aircraft had been used for bank business both before and after it was purchased by its chairman.[766] Under these circumstances, the plaintiff's attorney's failure to submit evidence to support his version of pre-suit communications was "inexplicable" and the court found that the plaintiffs' claim was "grounded on inadequate inquiry and factual support in violation of Fed. R. Civ. P. 11."[767]

Notwithstanding the finding that Rule 11 had been violated, the court held that "Rule 11 is not a fee-shifting statute . . . 'a movant under Rule 11 has no entitlement to fees or any other sanction.'"[768] The court noted that the defendant chose a two-prong Rule 11 attack on the complaint

---

[764] *Id.* at *2.

[765] *Id.* at *1.

[766] *Id.* at *2.

[767] *Id.* at *3.

[768] *Custer*, U.S. Dist. LEXIS 14,468 1993 at *3 (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 409 (1990)).

and that it prevailed on one ground. Accordingly, an award of only half of its attorney's fees was entered against plaintiff's counsel.[769]

G. MISCELLANEOUS

In *Dempsey v. Associated Aviation Underwriters*[770] the plaintiff attempted to set aside a $300,000 settlement involving a 1988 airplane accident against Cessna Aircraft Company on the grounds that Cessna allegedly had "withheld" potentially critical documents from the plaintiffs during discovery. Plaintiffs filed this action against Cessna, Associated Aviation Underwriters (AAU) and its Overland Park, Kansas Claims Manager. The suit sought rescission of the settlement without tendering the $300,000 settlement payment back to Cessna. The court dismissed the fraud claim against Cessna on the grounds that the plaintiffs had waived their right to assert a fraud action by failing to tender the settlement proceeds back to Cessna.[771] The court dismissed the claims against AAU and its claims manager on the grounds that they owed no legal duty independent of that which Cessna owed the plaintiffs.[772]

In an attempt to seek post-judgment relief under Federal Rule of Civil Procedure 60(b), the plaintiffs argued that they had newly-discovered evidence. The newly-discovered evidence was that: (1) Cessna allegedly would not have accepted the money, if tendered, based upon plaintiffs' subsequent attempt to return the funds in a Maryland court proceeding; and (2) a letter from AAU to certain Cessna counsel regarding document retention on closed Cessna files. The court held that the new evidence that Cessna would not have accepted the money was evidence which could have been discovered if plaintiffs had acted diligently.[773] Indeed, the court noted that it had recom-

---

[769] *Id.* at *3.
[770] 147 F.R.D. 88 (E.D. Pa. 1993).
[771] *Id.* at 89.
[772] *Id.*
[773] *Id.* at 90.

mended to plaintiff's counsel that the money be returned during the course of oral argument, six weeks before entering the judgment against plaintiffs on those grounds.[774] The court stated that Cessna's refusal to accept the money in the Maryland action was perfectly justified on the grounds of collateral estoppel and *res judicata* and did not indicate that Cessna would not have accepted the money had it been offered prior to the judgment in the federal action.[775]

The court further rejected the correspondence between Cessna and its counsel as "newly-discovered evidence" on the grounds that such correspondence was unrelated to the present litigation and did not change the court's view that neither AAU nor its claims manager had been involved in the settlement negotiations which provided the basis for plaintiffs' original claim against Cessna.[776]

VIII. DAMAGES

In *Datskow v. Teledyne Continental Motors Aircraft Products*[777] the federal district court granted a remittitur on a verdict in excess of $107 million dollars in the survival and wrongful death actions arising from the crash of a Beechcraft Debonair Aircraft carrying Robert Gross, his wife, and two sons. As stated by the court:

> This products liability case arises out of the crash of a private airplane in which four people were killed. Plaintiffs sued the manufacturer of the engine on the theory that a defect in the plane's engine caused the crash.
>
> On February 24, 1993, after a month long trial, a jury returned a verdict in plaintiffs' favor on theories of strict liability, negligent design, and failure to warn. The jury awarded the following damages: $250,000 to Juletta Cook, the mother of one of the decedents, on her wrongful death claim for economic loss; $5,000 for funeral expenses;

---

[774] *Id.*
[775] *Dempsey*, 147 F.R.D. at 90.
[776] *Id.* at 91.
[777] 826 F. Supp. 677 (W.D.N.Y. 1993).

> $30,000 to plaintiff Grossair, Inc., the owner of the plane, for loss of the aircraft, and a total of $107,000,000 for conscious pain and suffering of the decedents.[778]

Defendant TCM filed its motion to set aside the jury verdict and enter judgment in its favor under Section 50(b) of the Federal Rules of Civil Procedure, for a new trial pursuant to Rule 59, or for remittitur of damages under Rule 59.

The district court held that TCM had not met its burden of establishing that the jury verdict in favor of the plaintiffs should be set aside and that a verdict should be entered in its favor.[779] Instead, the court concluded that the expert testimony presented by the plaintiffs, viewed in the light most favorable to the plaintiffs, was sufficient to allow a reasonable jury to arrive at a verdict in their favor.[780] The court held that the challenge to the qualifications of plaintiff's experts had been ruled upon at trial.[781] The court did not elaborate upon its rulings other than to state that they would not be repeated in response to the motion to set aside the verdict.[782] The court noted that both sides had used accident reconstruction experts and that the recent Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals* [783] stressed the value of "'[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof' over the outright exclusion of 'shaky but admissible evidence.'"[784]

The court also denied TCM's motion for a new trial, ruling that evidence of correspondence between the deceased pilot and TCM was properly admitted for the limited purpose of showing notice to TCM of problems associated with the engine.[785] This evidence did not show the specific de-

---

[778] *Id.* at 681. Significantly, the $107 million award did *not* include any punitive damages. As set forth above, it consisted solely of an award intended to compensate for actual damages, including survival damages for conscious pain and suffering. *Id.*

[779] *Id.* at 682.

[780] *Id.*

[781] *Id.*

[782] *Datskow*, 826 F. Supp. at 682.

[783] ___ U.S. ___, 113 S. Ct. 2786 (1993).

[784] *Datskow*, 826 F. Supp. at 682-83 n.1.

[785] *Id.* at 684-85.

fect which was alleged to have caused the crash. It did, however, explain the basis for the plaintiff's expert's opinion.[786] The court also rejected TCM's arguments that a videotape of a computer-generated animation should not have been admitted into evidence.[787] The court noted that plaintiff's expert carefully couched his description of the animation as "his opinions" of what occurred, rather than a true reconstruction of what had happened.[788] The court further stated that the cautionary instructions to the jury had been sufficient to overcome any prejudice.[789]

The court also rejected TCM's arguments that plaintiff's counsel had engaged in inflammatory and improper statements and improper argument.[790] The court again stated that any improper statements, questions or argument were the general subject of the precautionary statements to the jury at the close of evidence and also in the jury charges.[791] These statements were that counsel's arguments were not evidence and that the jury was not to be "swayed by bias, prejudice or sympathy" as a result of such statements.[792] The court further noted that defense counsel did not object to certain statements, particularly during summation, and that it may be error to grant a new trial where a party fails to object during final argument.[793]

The court then considered the issue of whether a motion for new trial on damages or a remittitur should be granted. A threshold issue was presented by certain affidavits obtained from a juror and certain private investigators who

---

[786] *Id.* Arguably, the defendant may have avoided this problem by stipulating to receipt of notice of generalized problems. However, to the extent that the information contained in the letters also purported to provide a basis for the expert's opinion, a legitimate objection, depending on the content of the letters, might have been that such letters did not provide any more information than that stipulated or provide the type of information upon which an expert should rely in forming opinions as to the particular cause of the alleged engine failure in question.

[787] *Id.* at 685.

[788] *Id.* at 686.

[789] *Datskow*, 826 F. Supp. at 685.

[790] *Id.* at 686.

[791] *Id.*

[792] *Id.* at 687.

[793] *Id.*

had contacted the jurors stating that they had been informed of the $105 million verdict awarded against General Motors in Atlanta on February 4, 1993.[794] The court criticized TCM's counsel for conducting such a full scale interrogation of the jurors without court approval.[795] The court stated that its statement that counsel for the parties could speak to the jurors, if the jurors chose to speak to counsel, did not authorize a full scale interrogation of the jury by private investigators.[796]

The court concluded that the affidavits were not admissible under Rule 606 to the extent they related to the jurors' thought processes.[797] To the extent that the affidavits reported on the jury's knowledge of the $100,000,000 verdict, the court concluded that such information was not prejudicial information "improperly brought to bear" upon the jury.[798] Moreover, the court noted that defense counsel was aware of such $100,000,000 verdict, however, but never asked the court to issue any cautionary instructions or request any other curative or preventative measures.[799]

In reviewing the issue of whether to grant remittitur or new trial on damages, the court concluded that a new trial on damages would only be granted in the event that "'prejudicial error has infected the jury's entire consideration of plaintiff's pecuniary loss.'"[800] The court held that the size of the award itself did not mandate a new trial as opposed

---

[794] *Id.* at 688. This award included primarily *punitive* damages against General Motors, Inc. for allegedly concealing a design defect. As suggested by the court, the federal court review of whether remittitur or new trial should be granted on constitutional grounds as to excessive punitive damage awards may be more limited than that of a federal court in reviewing comparable awards under state law for compensatory damages, as in this case. *Cf. Id.* at 690 n.6. *See also* Moseley v. General Motors, No. A94A0826, No. A94A0827, 1994 Ga. App. LEXIS 797 (June 13, 1994) (reversing a $105 million verdict against GM on grounds that plaintiff's counsel repeatedly violated in limine instructions as to other accidents, deaths, lawsuits and discovery disputes, but rejecting the constitutional challenge).

[795] *Datskow*, 826 F. Supp. at 688.

[796] *Id.*

[797] *Id.*

[798] *Id.* at 689.

[799] *Id.*

[800] *Datskow*, 826 F. Supp. at 691.

to remittitur.[801] The court also rejected TCM's argument that the judge's instruction referring to the amount of the jury verdict as being "ten dollars or ten million dollars, whatever the figure is, just put it down there," was not prejudicial because the court was instructing the jury not to attempt to discount the damage award according to the percentage of fault attributed to each party.[802] The court said the contention that this statement "may have unintentionally led the jury to believe that the range of reasonableness on the facts of this case extended to an eight-figure sum per person" bordered on ludicrous.[803] Finally, the fact that there was no objection made to this statement at trial was reason enough to deny defendants' motion.[804]

The court concluded that remittitur was proper in this case, and it should be in an amount which provides "the maximum that would be upheld by the trial court as not excessive," and "which least intrudes upon the province of the jury."[805] The court reviewed approximately 20 cases involving verdicts for conscious pain and suffering to determine the proper remittitur in this case. The court conditionally granted defendant's motion for a new trial unless plaintiffs stipulated to a remittitur *as to each decedent* of the amount awarded by the jury that exceeds $250,000.[806] The court also granted a remittitur of the wrongful death award to Mrs. Gross' mother, finding a lack of evidence of Susan Gross' income or evidence that would support an award of $25,000 per year support to her

---

[801] *Id.*

[802] *Id.*

[803] *Id.* at 691.

[804] *Id.*

[805] *Datskow*, 826 F. Supp. at 694.

[806] *Id.* The court stated that:

> [plaintiff's] decedents suffered unbearable pain, as well as extreme mental anguish both from fear of their own deaths and out of concern for each other. It is clear, however, that the proof shows their suffering lasted at most for several minutes. There was no significant difference in the time that each lived. Under these facts and using the "least intrusive" standard, I find that the damages for conscious pain and suffering should not have exceeded $250,000 for each decedent.

Id.

mother.[807] Her mother lived several hundred miles away, and, while it was undisputed that she provided personal services to her mother, the award appeared to be excessive.[808] The court reduced the award by remittitur to $150,000.[809]

The court also conditionally granted the motion for a new trial on the $30,000 award for the value of the airplane.[810] There was no evidence as to the fair market value of the airplane other than it had been purchased in 1982 for $22,400.[811] Accordingly, the court granted judgment as a matter of law in favor of defendant and against plaintiff Grossair, Inc., but conditionally granted the motion for new trial if the judgment was thereafter vacated and reversed.[812]

In conclusion, the district court reduced the total amount of the award to $1,105,000 from a jury verdict in excess of $107,000,000, and ruled that defendant would be entitled to a new trial unless plaintiffs agreed to remittitur.[813]

In *Quinones-Pacheco v. American Airlines*[814] a "zero damages verdict" was the subject of the plaintiffs' appeal. The plaintiffs' claims resulted from an encounter with severe turbulence which allegedly caused severe permanent injuries to both of them. Notably, however, both of them claimed to be uninjured at the time of the incident, and did not seek immediate follow-up care. Further, Mr. Quinones-Pacheco continued with his military duty and Ms. Fernandez took a new and strenuous job as a seamstress, while also for caring for two young daughters. The only evidence of any injury was a CT scan of Mr. Quinones which was taken approximately one year after the accident. This scan showed a her-

---

[807] *Id.* at 695.

[808] *Id.*

[809] *Id.* at 697.

[810] *Datskow*, 826 F. Supp. at 697.

[811] *Id.*

[812] *Id.*

[813] *Id.* at 698. The court also denied plaintiffs' motion to apply North Carolina law of damages in the event that a new trial is granted on the issue of damages. *Id.*

[814] 979 F.2d 1 (1st Cir. 1992).

niated lumbar disk. Mr. Quinones claimed that as a result of that back injury he had been denied reenlistment in the U.S. Army and claimed total and permanent disability as a result of his injury.

The First Circuit Court of Appeals held that the jury reasonably could have rejected all of Ms. Fernandez' claims.[815] Upon the trial of the case, the evidence of an independent medical examination was submitted in which the examiner stated that Ms. Fernandez arrived at the examination wearing a shoulder brace (not the neck brace that her treating physician had prescribed) and that she was extremely uncooperative, refusing to move or bend because of pain and crying out whenever she was touched.[816] The physician testified that he found this behavior bizarre, could find no objective basis for her claims of injury, and concluded that her injuries were likely a fabrication for secondary gain.[817]

Although a slightly more difficult case, the First Circuit held a jury also could have rejected the claims of Mr. Quinones.[818] Even though he had been diagnosed as having a herniated lumbar disk, the only evidence of causation was the conclusion of the doctor that it was secondary to the turbulence incident more than a year before.[819] The trial court also excluded the expert testimony of an economist seeking to establish Mr. Quinones' loss of income over the course of his lifetime.[820] The First Circuit held that there was no medical evidence to support the conclusion that any injury which he had suffered resulted either in total disability or permanent disability.[821] As such, it was improper for an economic expert to rely on the assumption that he was totally and permanently disabled in arriving at the conclusion of damages.[822] Hence, the trial court's discretion with

---

815 *Id.* at 4.
816 *Id.*
817 *Id.*
818 *Id.* at 6.
819 *Quinones-Pacheco*, 979 F.2d at 5.
820 *Id.*
821 *Id.*
822 *Id.*

respect to the admission or exclusion of testimony was affirmed.[823]

Finally, the court refused to award attorney's fees to American Airlines because the trial court had refused to do so.[824] The appellate court held that it would not substitute its judgment for that of the trial judge who had seen the evidence unfold at trial.[825]

IX. INSURANCE COVERAGE

A. COVERAGE PROVISIONS

1. Ambiguous Terms

In *Underwriters v. Cascade Helicopters, Inc.*[826] the federal district court interpreted coverage under a non-owned aircraft endorsement issued to Cascade Helicopters. Cascade Helicopters, a commercial operator, had an insurance policy providing up to $1,000,000 bodily injury and property damage liability coverage for a 1990 Robinson R-22 rotorcraft aircraft. The policy included a non-owned aircraft endorsement subject, *inter alia*, to the following provisions:

> [I]n addition to the Aircraft declared hereunder, cover granted under this policy applies to Aircraft used by the Named Insured but not so declared, ALWAYS PROVIDED the Named Insured:
> (1) has no interest in the Aircraft as owner in whole or in part;
> (2) exercises no part in the servicing or maintenance of Aircraft;
> (3) exercises no part in the appointment or provision of personnel for the operation of the Aircraft.
> THIS ENDORSEMENT does not apply:
> . . . .
> (b) to any Aircraft having a seating capacity in excess of one (1) passenger seat;

---

[823] *Id.* at 6.
[824] *Quinones-Pacheco*, 979 F.2d at 7.
[825] *Id.*
[826] No. 92-C5607, No. 93-C2396, 1993 U.S. Dist. LEXIS 13227 (N.D. Ill. Sept. 17, 1993).

. . . .

(d) when the Aircraft is used by the Named Insured for hire and reward.[827]

Cascade entered into a contract with A & A Aerial Spraying for the use of a Hiller helicopter to be used, along with its Robinson aircraft, to fulfill a contract to fly video producers to film an off-shore boat race near Michigan City, Indiana. Plaintiffs alleged that Michigan City Water Sports agreed to pay Cascade for the use of both helicopters. Defendants contended that Cascade was to receive no compensation for the operation of the Hiller aircraft, but only for use of the helicopter owned by Cascade.

On August 3, 1991, during the flight to film the off-shore boat race, the Hiller helicopter crashed injuring the pilot and two passengers. Defendant Cascade requested coverage for the injuries and property damage claims arising out of the incident. Underwriters claimed that no coverage existed because the Hiller aircraft had a seating capacity of more than one passenger and was being used for "hire and reward."

The district court first evaluated the one passenger seat exclusion.[828] The insured argued that, even though the helicopter was occupied by two passengers, it only had one continuous bench seat on which three people can sit.[829] Since the terms "passenger seat," "seat" and "seating capacity" are not defined in the plaintiff's policy, the court concluded that the policy was ambiguous and must be construed against the insurer.[830] It stated:

> [Underwriters] could have been more specific as to their intended meaning of the word seat when drafting the policy simply by either defining the term or by not using the word when drafting this exclusion, stating instead that the added coverage does not apply to any aircraft having a seating capacity in excess of one passenger. By choosing to use the

---

827 *Id.* at *1-2.
828 *Id.* at *6.
829 *Id.* at *6-7.
830 *Id.*

> word seat in this way, the term can reasonably be construed to mean a bench that can hold more than one passenger. Because ambiguities are to be construed against the insurer, summary judgment is inappropriate as to the application of this exclusion.[831]

With respect to the "hire and reward" exclusion, the court noted that there was a question of fact as to whether Cascade received compensation for the use of the Hiller helicopter.[832] More fundamentally, however, the district court considered the affidavit of an aviation claims manager that a "hire and reward" exclusion contained in an insurance policy purchased by a commercial operator, such as Cascade, *could not* apply to commercial operators because their operations are generally only for hire and reward.[833] Such an exclusion would "completely abrogate the extended coverage of the non-owned aircraft endorsement since it would eliminate every possible use of the aircraft by the named insured."[834] Accordingly, the court held that genuine issues of fact existed as to whether the "hire and reward" clause was intended by the parties to apply to Cascade, and Underwriters' motion for summary judgment was denied.[835]

2. *Unambiguous Terms*

In *Home Insurance Co. v. Phillips*[836] coverage under a premises liability policy for an accident which occurred off the airport was the issue before the U.S. District Court for the Southern District of Florida. The claim arose from a takeoff accident on August 25, 1988, from North Perry Airport in Broward County, Florida. This accident involved the crash of a twin engine Piper Aerostar into the roof of a building. One of the persons injured was an employee of one of the stores in the building. The employee subsequently filed suit against the insured, Lauderdale Aviation

---

[831] *Cascade Helicopters, Inc.*, 1993 U.S. Dist. LEXIS 13227 at *7-8.
[832] *Id.* at *8.
[833] *Id.* at *9.
[834] *Id.* at *10.
[835] *Id.*
[836] 815 F. Supp. 1471 (S.D. Fla. 1993).

and against the Estate of Louis E. Phillips, its president and owner, who died in the accident. A consent judgment for $750,000 was entered against the personal representative of Mr. Phillips' Estate. Plaintiffs then filed a second complaint against Lauderdale Aviation. Final judgment was entered against Lauderdale Aviation after the parties agreed that plaintiffs would accept an assignment of the rights under the insurance policy issued by Home. After final judgment was entered against Lauderdale Aviation, the plaintiffs' counsel demanded that Home satisfy the judgment of $750,000 on behalf of Lauderdale Aviation.

The policy in question was entitled "Owners', Landlords' and Tenants' Liability Insurance Coverage for Designated Premises and Related Operations in Progress (other than structural alterations, new construction and demolition)."

Premises-operations was defined as follows: "That portion of the airport located at North Perry Airport, FL, in the care custody or control of the named insured."[837]

The body of the policy states in pertinent part:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of A. bodily injury or B. property damage to which this insurance applies, caused by an occurrence and arising out of the ownership, maintenance or use of the Insured Premises *and all operations necessary or incidental thereto. . . .*[838]

Additionally, an airport liability endorsement which was incorporated into the policy also stated that it applied to the ownership, maintenance, or use of the airport by the named insured, including all operations, necessary or incidental thereto.

The policy included the following exclusion: "This insurance does not apply . . . (b) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of . . . (3) any aircraft

---

[837] *Id.* at 1473.

[838] *Id.* (emphasis added).

owned by, rented to, loaned to or held for demonstration or sale by the insured."[839]

The district court held that there was no coverage for the liability claims on the ground that to broadly construe the language "arising out of the . . . use of the insured's premises, and all operations necessary or incidental thereto" would effectively convert the premises liability policy to a general liability policy.[840] The court recognized other decisions which had drawn a distinction between the immediate circumstances which inflict bodily injury and the antecedent negligence which sets the chain of events leading to the injury in motion.[841] To provide coverage simply because the antecedent negligence occurred as a part of the use of the premises (i.e., maintenance and servicing of aircraft on the premises) would be to eliminate any distinction between premises liability and general liability policies.[842]

As an alternative basis for the decision, the court also noted that the pilot Louis E. Phillips, was an additional insured under the policy, and, as such, there was no coverage for bodily injury arising out of the use of an aircraft owned by, rented to, or loaned to the insured.[843] The district court rejected the argument that the exclusion did not apply because Louis E. Phillips was simply "an insured," rather than "the insured."[844] The court held that "the intended meaning of the policy exclusion [was] clear."[845] Accordingly, the district court denied any coverage for the $750,000 consent judgment which had been entered against Home's insured.[846]

In *Coleman v. Charlesworth*[847] the Illinois Supreme Court interpreted the coverage provided to an insured as a result

---

[839] *Id.* at 1474.
[840] *Id.* at 1473.
[841] *Phillips*, 815 F. Supp. at 1473.
[842] *Id.*
[843] *Id.* at 1474.
[844] *Id.*
[845] *Id.*
[846] *Phillips*, 815 F. Supp. at 1474-75.
[847] 623 N.E.2d 1366 (Ill. 1993).

of a "cover note" or "binder" prior to issuance of the policy. As stated by the court: "[The insured,] Windy City Balloon Port purchased a policy providing aviation premises and products liability insurance. Windy City offered commercial sightseeing flights to the public in hot air and helium balloons owned by third parties. Windy City also offered repair and refueling services for balloons."[848] The claims involved in this case arose from an accident in which a hot air balloon piloted by a third party carrying five passengers struck electrical power lines, resulting in the death of the pilot and four of the five passengers. The passengers filed suit against Windy City and coverage was tendered to the insurer, which refused to appear, defend, or extend coverage.[849] The court entered a judgment of $4.4 million against Windy City.[850]

Windy City contended that the "cover note" conflicted with the policy itself, but that under both the cover note and the policy, coverage was provided. The court noted that the cover note itself only stated that it provided coverage "to premises and products liability to third parties arising out of [their] operations at their balloon port, excluding repairs." The cover note also specifically stated that it was subject to the terms, conditions and exceptions of the policy to be issued by the insurers.[851] The Illinois Supreme Court acknowledged that an "insurance binder which does not itself specify the terms and provisions of the policy, incorporates, as a matter of law, all of the terms and provisions of the policy."[852]

Referring to the terms and conditions of the policy, the court noted that coverage was provided as follows:

> bodily injury or property damage (a) in or about the premises . . . as a direct result of the services granted by the Assured [Windy City] or (b) elsewhere in the course of any

---

[848] *Id.* at 1367.

[849] *Id.*

[850] *Id.*

[851] *Id.* at 1368.

[852] *Coleman*, 623 N.E.2d at 1368.

> work or the performance of any duties carried out by the Assured or his employees in connection with the business or operations . . . caused by the fault or negligence of the Assured or any of his employees engaged in the Asssured's business.[853]

The court further noted that the policy also was subject to the following exclusion: "bodily injury or property damage caused by . . . (b) any Ships, Vessels, Crafts, or Aircraft owned, chartered used or operated by or on account of the assured [Windy City]."[854]

The court noted that Windy City initially claimed that the pilot "was an employee, agent and joint venturer of Windy City" and that coverage, therefore, was provided under the policy for the fault or negligence of the pilot as an employee of the insured's business.[855] The court held that the exclusion for bodily injury caused by aircraft operated by or on account of the insured excluded such coverage.[856] The court also noted that the premises liability portions were not applicable in that the accident did not occur "in or about the premises."[857]

The insured's alternative argument was that there was no joint venture agreement and that Windy City's negligent act was "allowing the balloon to take off given the weather conditions at the time of departure"[858] which occurred at its premises.[859] The court refused to allow Windy City to disavow the joint venture relationship, having plead such a relationship in its initial complaint.[860] The court held that, in view of the joint venture relationship, the exclusion for aircraft "operated by or on account of the insured" still excluded coverage.[861]

---

[853] *Id.*
[854] *Id.*
[855] *Id.*
[856] *Id.*
[857] *Coleman*, 623 N.E.2d at 1368-69.
[858] *Id.* at 1368.
[859] *Id.*
[860] *Id.* at 1369.
[861] *Id.*

Finally, the Illinois Supreme Court held that providing balloon rides was not a good or product, therefore, there was no coverage under the products liability provisions.[862] The Illinois Supreme Court concluded "Aircraft operators insurance would have provided Windy City with coverage for liabilities arising out of the use of aircraft. The policy in question, however, was not that type of insurance."[863]

The definition of "in motion" versus "not in motion" was the issue decided by the Arkansas Court of Appeals in *Keller v. Safeco Insurance Co. of America.*[864] If the aircraft was "not in motion," then a $1,000 deductible applied. If the aircraft was "in motion," however, then a 10% deductible applied. The aircraft was insured for $140,000, and suffered $9,650 in damages during a wind storm. The damage occurred during a storm which developed when the aircraft was on the apron, but not tied down. The pilot noticed the storm approaching, started the engine, and taxied down the runway in order to secure the plane. Before the pilot could reach the tie-down area, the wind conditions worsened, and the pilot turned the engine off. The propeller continued turning, and the wind lifted the tail, causing the propeller to hit the tarmac and damage all its blades. The insured testified that the engine was not running, but apparently conceded that the propeller was still turning from the momentum of the engine when the tail was lifted up.[865] The term "in motion" is defined as follows: "The aircraft shall be deemed 'in motion' when moving under its own power, or momentum therefrom. The aircraft shall be deemed 'not in motion' under all other circumstances."[866]

Similarly "aircraft" is defined as follows:

> "Aircraft" means the airplane or rotorcraft described herein and shall include the engines, propellers, rotor blades, tools and repair equipment therein which are standard for the

---

862 *Coleman*, 623 N.E.2d at 1369.

863 *Id.*

864 866 S.W.2d 419 (Ark. Ct. App. 1993).

865 *Id.* at 421.

866 *Id.* at 420.

> make and type of the aircraft, and operating and navigation instruments and radio equipment usually attached to the aircraft, including parts temporarily detached and not replaced by other similar parts.[867]

The policy also included a provision which stated that:

> [i]n the event the aircraft, while not in flight, is damaged by wind . . . which occurs while the aircraft is unhangared and not in flight, the insurance . . . is subject to a single amount deductible "Not in Motion" or "In Motion" of ten percent (10%) of the amount of the insurance for the aircraft.[868]

Safeco's position was that, because the propeller was a part of the aircraft and was in motion, the "in motion" deductible applied. The insureds argued that it was not clear, under the definition of "in motion," whether the aircraft was "in motion" if any part of it was moving. The insureds also argued that, under the policy, for the aircraft to have been "in motion" the aircraft as a whole must have been moving.[869]

The Arkansas Court of Appeals agreed with the insurer that the policy was not ambiguous and the "in motion" deductible was applicable.[870] Furthermore, even though the insurer apparently had not raised the wind damage exclusion, the court also concluded that "the aircraft was damaged by wind, while unhangared and not in flight," thereby invoking the single amount deductible for wind damage.[871]

The dissent criticized the majority opinion for overlooking the ambiguity as to whether the aircraft as a whole must be "in motion," as opposed to any of its parts.[872] Additionally, the dissent strongly objected to the majority reference to the wind damage exclusion when the parties had not raised the issue. The dissent noted as follows:

---

867 *Id.*

868 *Id.*

869 *Keller*, 866 S.W.2d at 421.

870 *Id.* at 422.

871 *Id.*

872 *Id.*

> Although I agree that this provision may be applicable, it is extremely important to note that this provision was not abstracted by the parties, and none of the parties argued either to the trial court or to this court that it is applicable to the issue before us. The silence of the parties in this regard gives us an important indication of how they interpret their own agreement, and I believe that we have failed to give the parties' construction of the agreement the great weight to which it is entitled. Perhaps the parties do not cite the deductible provision because it was not in effect at the time of the accident. I suggest that it is unwise of us to presume that we have a greater familiarity with the terms of the parties' agreement than the parties themselves.
>
> Finally, I wish to emphasize that the deductible provision quoted by the majority in support of its decision was not argued as a basis for summary judgment in the appellee's motion. By seizing on this unargued point in order to affirm, we are going far beyond the parameters of Rule 56. Our Supreme Court has said that, in considering a motion for summary judgment, it would be error for a court to consider any allegations brought out for the first time in the parties' briefs. In the case at bar, we are, in effect, sanctioning a summary judgment on grounds that were never brought out by the parties at all. Even if we have thereby arrived at an answer that is academically sound, that answer is not legally correct if we must depart from our standard of review to reach it.[873]

A coverage issue under a homeowner's policy was presented to the Georgia Court of Appeals in *Ivey v. First of Georgia Insurance Co.*[874] The case arose from an accident in which Ivey, the insured under the policy, sold a Midget Mustang I Airplane to 19-year-old Randy Smith. Smith only recently obtained his private pilot's license and Ivey undertook to provide flight instruction.

> After some preliminary instruction in a two-seat, tail-wheel aircraft, Smith attempted his first solo flight in the Mustang. Because of the single seat design of the Mustang, Ivey re-

---

[873] *Id.* at 422-23 (citations omitted).

[874] 434 S.E.2d 556 (Ga. App. 1993).

> mained on the ground and used a handheld radio to communicate with Smith during flight. On his first landing approach, Smith bounced the airplane and attempted to abort the landing and execute a "go around" by applying full power. While this procedure was correct for the aircraft Smith had been trained in, the Mustang was a high-power, high-torque aircraft, and applying full power caused the plane to roll inverted. Smith then lost control resulting in a serious accident.[875]

First of Georgia brought a declaratory judgment action alleging no liability coverage for Ivey because the claims arose "out of the ownership, maintenance, use, loading or unloading of an aircraft."[876] The majority found that use of the aircraft did not require the insured, Ivey, to actually be in physical contact with the aircraft as long as there was "control" over the aircraft while it was being used.[877] The court stated that "[i]t [was] impossible to imagine a circumstance in which a flight instructor could provide ground to air instruction without the involvement of an airplane."[878] Accordingly, both Ivey and Smith were "using the plane at the time of the tragic accident."[879] The court held that coverage was excluded under the homeowner's policy.[880] A dissenting opinion argued that the term "use" in an exclusion should be narrowly interpreted and that the majority had confused the rules of construction by applying cases involving the liberal interpretation of coverage provisions. The dissent concluded that the word "use" was subject to two interpretations requiring a narrow construction which would support coverage.[881]

In *St. Paul Guardian Ins. Co. v. Old Republic Ins. Co.*[882] St. Paul sought a declaration that its personal umbrella liability policy did not provide coverage for liability due to aircraft

---

875 *Id.* at 557.
876 *Id.*
877 *Id.*
878 *Id.*
879 *Ivey*, 434 S.E.2d at 557.
880 *Id.* at 558.
881 *Id.* at 560.
882 No. 92-1045-FR, 1993 U.S. Dist. LEXIS 4458, at *2 (D. Or. Apr. 2, 1993).

accidents. The underlying St. Paul policy excluded "liability resulting from aircraft accidents, commercial or noncommercial. But we do cover model aircraft incapable of carrying passengers or property. PAR II covers your personal property while it is on any aircraft."[883] The umbrella policy did not itself contain an exclusion of aircraft liability coverage, but stated the following: "*In addition to the claims not covered* that are listed in your PAR II policy, this endorsement does not cover the following types of claims . . . ."[884]

Construing the two provisions in combination, the court held that the umbrella endorsement incorporated the exclusions of the PAR II policy, which expressly excluded liability coverage for aviation accidents.[885] Accordingly, the court held that there was no liability insurance coverage for the aircraft and the accident involved in that case.[886]

B. Persons Covered

The Fifth Circuit addressed the issue of liability coverage for injuries to a renter pilot in *Ranger Insurance Co. v. Mijne*.[887] In *Mijne* Marc Potzner rented a Piper Tomahawk aircraft from Ranger's insured, Levelland Aviation. Potzner and a friend, Mijne, both of whom were licensed pilots, were involved in a crash in which it was uncertain which of the two men was piloting the plane when it crashed. The policy limits under the Ranger Insurance Company were limited to $100,000.00 for each person and $300,000.00 for each occurrence.

Notably, the policy defined passenger as "any person who is in the aircraft or getting in or out of it."[888] The policy also included a provision which stated that it did not provide bodily injury and property damage coverage to renter pilots.[889]

---

[883] *Id.* at *3.
[884] *Id.* at *4 (emphasis added).
[885] *Id.* at *8.
[886] *Id.* at *9.
[887] 991 F.2d 240 (5th Cir. 1993).
[888] *Id.* at 241.
[889] *Id.* at 242.

Prior to suit, Ranger Insurance Company offered $100,000.00 to be divided between the estates of Mijne and Potzner. The estates of Mijne and Potzner contended that they each were entitled to $100,000.00. As a result of this dispute, Ranger Insurance Company interpleaded $100,000.00 into the registry of the federal court and requested a declaratory judgment as to whom to pay the insurance proceeds.[890] Each of the defendants filed counterclaims and crossclaims for declaratory judgment and all parties filed motions for summary judgment.[891]

The district court concluded that the following provision precluded coverage for any *injuries to renter pilot* Potzner: "Who is not protected *Your bodily injury* and *property damage* coverage does not protect: . . . [a]ny *renter pilot.*"[892] Hence, the district court concluded that there was no ambiguity and held that there was no coverage for any injuries to Potzner because "renter pilots are not 'protected' under the policy - as excluding from coverage any bodily injury to renter pilots."[893]

On appeal, the Fifth Circuit Court of Appeals distinguished the issue of liability coverage from the types of damages for which coverage would be provided under the policy.[894] The court held that the exclusion from liability coverage for renter pilots did not exclude coverage for any claims which a renter pilot might make arising from bodily injuries to himself.[895] Accordingly, the Fifth Circuit Court of Appeals held that the policy, while not providing liability coverage for the liability of a renter pilot, did provide coverage for any injuries to the renter pilot.[896] The Fifth Circuit reversed the district court's grant of declaratory and sum-

---

890 *Id.*

891 *Id.*

892 *Mijne*, 991 F.2d at 242.

893 *Id.* at 242-43.

894 *Id.* at 244.

895 *Id.*

896 *Id.*

mary judgment for Ranger and rendered judgment for Potzner.[897]

C. LIENHOLDER'S ENDORSEMENTS

In *Union Planter's National Bank v. American Home Assurance Co.*[898] the court addressed the proper recovery by a lienholder under a breach of warranty endorsement where the insured aircraft had been recovered, repossessed, and sold, thereby resulting in a deficiency claim on the part of the lender. The lender contended that the full amount of the deficiency was the amount of its damages under the breach of warranty endorsement. The insurer, on the other hand, contended that it had liability only for property damage to the aircraft prior to its recovery as collateral for the debt, but not for the underlying debt.

The aircraft involved in this case apparently had been seized as a result of its use in drug trafficking by a person other than the named insured. Upon its recovery by the lienholder, the aircraft was sold for a substantial deficiency. The Tennessee Court of Appeals found it was necessary to look to the underlying policy to determine the extent of coverage.[899] The only coverage provided in the underlying policy was "physical damage coverage" and, as such, the policy clearly and unambiguously limited the lienholder's coverage to any physical property damage which the lienholder could establish was covered under the policy.[900] The underlying policy also expressly precluded seizure as a covered event.

D. POLICY RENEWAL

In *Insurance Company of Pennsylvania v. Hoffman*[901] the U.S. District Court for the District of Minnesota held that certain alleged misrepresentations by the insured as to

---

[897] *Mijne*, 991 F.2d at 244.
[898] 865 S.W.2d 907 (Tenn. Ct. App. 1993).
[899] *Id.* at 912.
[900] *Id.*
[901] 814 F. Supp. 782 (D. Minn. 1993).

whether the aircraft to be insured was newly purchased and whether the aircraft had four seats, rather than five seats, were not material misrepresentations such as to void coverage arising from a mid-air collision involving the aircraft.[902] The court held that Minnesota law did not define an increased risk of loss as an increase in the "amount of the insured's exposure."[903] Instead, the court held that Minnesota law limited the phrase risk of loss to the "*likelihood* of future liability on the insurance company for loss."[904]

The district court further held that the misrepresentations, even if they increased the risk, were not material misrepresentations because the plaintiff's insurance manager, AIG Aviation, issued coverage to the insured for the same aircraft for the prior policy year.[905] The court stated that the application for the prior policy correctly stated that the aircraft was not newly acquired and that the aircraft had been modified to have seats for five passengers.[906] Apparently, the policy in question in this case had been obtained by a new insurance agent.

Finally, the district court did not permit the Insurance Company of the State of Pennsylvania to amend its complaint to add a claim that the misrepresentations were made with "the intent to deceive or defraud."[907] The court held that the time for amendments of the pleadings had expired and that no reason or justification to permit the amendment had been established.[908]

---

[902] *Id.* at 786.

[903] *Id.* at 786-87.

[904] *Id.* (quoting Preferred Risk Mut. Ins. Co. v. Anderson, 152 N.W.2d 476 (Minn. 1967)).

[905] *Id.* at 788.

[906] *Hoffman*, 814 F. Supp. at 787 n.14.

[907] *Id.* at 787-88.

[908] *Id.* at 787.

X. FAA ENFORCEMENT/LOCAL REGULATION

A. DUE PROCESS AND PROCEDURES

In *Pinney v. National Transportation Safety Board*[909] the court held that the NTSB did not exceed its statutory jurisdiction when it promulgated 14 C.F.R. § 61.15[910] which states that: "[a] conviction for the violation of any Federal or state statute relating to the . . . importation of . . . marijuana . . . is grounds for . . . [s]uspension or revocation of any certificate or rating issued under this part."[911]

Pinney challenged the regulation on the grounds that it exceeded the FAA's statutory jurisdiction. The Tenth Circuit court held that the FAA promulgated § 61.15 because a conviction indicated that the convicted "demonstrated" a "tendency" to act "without inhibition in an unstable manner with regard to the rights of others," and that pilots convicted of violating drug laws are "potentially dangerous because they are also likely to violate requirements concerning air safety."[912] This rationale provided a reasonable relationship between a conviction for violation of a drug law and flight safety. Furthermore, the Tenth Circuit held that the revocation of Pinney's certificate was the proper sanction because Pinney admitted piloting an aircraft which he believed may have been used to import marijuana.[913]

In *Smith v. NTSB*[914] the suspension of a pilot's certificate for violating terminal control air space was reversed on the grounds that the FAA Bulletin 86-2 of the Compliance and Enforcement Manual was not available to the public at the time of the violation.[915] The pilot challenged the suspension based upon the Administrative Procedure Act which states that "[a]dministrative staff manuals and instructions to staff that affect a member of the public" must be made

---

[909] 993 F.2d 201 (10th Cir. 1993).
[910] 14 C.F.R. § 61.15(a) (1993).
[911] *Pinney*, 993 F.2d at 202 (citing 14 C.F.R. § 61.15 (1993)).
[912] *Id.* at 203.
[913] *Id.* at 204.
[914] 981 F.2d 1326 (D.C. Cir. 1993).
[915] *Id.* at 1327.

available to the public and that "an agency may not rely upon any manual or instruction that it has not made available to the public."[916]

The NTSB attempted to avoid this reversal by contending that the policy did not affect the public and also that it did not rely upon Bulletin 86-2. The D.C. Circuit concluded that the Compliance and Enforcement Manual, which set forth the severity of sanctions for certain violations, directly affected the public and made a careful analysis of deterrence jurisprudence from Oliver Wendell Holmes to Richard A. Posner in concluding that the severity of the punishment is a well-recognized form of deterrence.[917] Indeed, the FAA had, itself, concluded that increased sanctions were necessary to provide "an effective deterrent" because previous sanctions had been ineffective.[918] Finally, the court rejected the argument that the NTSB had not relied upon Bulletin 86-2, in noting the sanctions imposed were precisely those established for the first time under the bulletin.[919]

B. Pilot Certificate Actions

The responsibility of an aircraft captain or pilot in command to determine the fitness of crew members for flight was presented in *Johnson v. National Transportation Safety Board.*[920] This case involved a commuter airline passenger flight in which the co-pilot was found to be intoxicated. Upon landing, the co-pilot was determined to have a blood alcohol level of .14, and was unable to pass certain objective field sobriety tests, such as "count[ing] backwards from thirty-nine, recit[ing] the alphabet, or balanc[ing] while walking heel-to-toe."[921] Additionally, other witnesses testified that they had detected the presence of alcohol on the co-pilot's breath. As a result, the co-pilot's pilot certificate

---

[916] *Id.* (citing 5 U.S.C. § 552(a)(2)(c) (1978)).
[917] *Smith* 981 F.2d at 1327-28 (citing 5 U.S.C. § 552(a)(2)(c)(1978)).
[918] *Id.* at 1327.
[919] *Id.* at 1329.
[920] 979 F.2d 618 (7th Cir. 1992).
[921] *Id.* at 619.

was revoked. The FAA also sought an emergency revocation of the captain's certificate under Federal Aviation Regulations 91.13(a) and 91.17(b).[922]

The administrative law judge reversed the emergency revocation of the captain's certificate on the grounds that section 91.17(b), which allows an intoxicated person to be carried in an aircraft, was not violated, but the judge affirmed the revocation on the grounds of section 91.13, stating that she believed the captain did know that the co-pilot was impaired, but was bound by a "conspiracy of silence" which prevented proof of that knowledge.[923] Nevertheless, the administrative law judge determined that the failure to detect the impaired condition was sufficient only to justify a four-month suspension rather than a revocation.[924] Both pilots appealed to the National Transportation Safety Board (NTSB), which reinstated the revocation against the captain.

In a strongly-worded opinion, the Seventh Circuit affirmed the NTSB and rejected any argument that the captain's conduct was merely negligent.[925] Indeed, that very argument seemed to inflame the court, which adopted a portion of the NTSB's brief that read as follows:

> In our view, the cockpit is no place to indulge uncertainties over a crewmember's full capacity to perform all required duties, and an ATP certificate holder serving as captain of a commercial flight who does not reflexively recoil from the possibility of entrusting the safety of his passengers and aircraft to a crewmember whose judgment and skill may be diminished by alcohol use neither appreciates the seriousness of operating while impaired nor understands the public safety obligations of his command.[926]

The court recognized that revocation of the pilot's certificate and deprivation of the pilot's ability to earn a living was

---

[922] 14 C.F.R. § 91.13(a), 91.17(b) (1992).

[923] *Johnson*, 979 F.2d at 619 n.14.

[924] *Id.* at 622-23.

[925] *Id.* at 622.

[926] *Id.* at 622.

a "harsh sentence."[927] Nevertheless, it refused to substitute its judgment for that of the NTSB stating:

> It is not an abuse of discretion to conclude that flying an aircraft while impaired is inherently dangerous conduct. Nor is it an abuse of discretion to conclude that the commanding pilot has an *absolute, non-delegable duty to ascertain the readiness of the co-pilot.* The Board is not constrained to impose serious sanctions on pilots only when tragedy occurs. Congress has delegated to the agency wide discretion to take reasonable action to avert preventable tragedies. This discretion extends both to removing culpable crew members to taking administrative actions to encourage responsible supervision by commanding pilots.[928]

The issue of providing common carriage without complying with the requirements of either FAR Part 135 or FAR part 121 was reviewed in detail in *Woolsey v. National Transportation Safety Board*,[929] which involved the revocation of Roger Woolsey's pilot certificate as the result of his failure to comply with safety requirements for pilots operating aircraft for a common carrier under FAR Part 135. Woolsey was the president of a corporation which provided air transportation to many prominent clients in the music industry.[930] The case arose as the result of an investigation following the crash of an aircraft carrying Reba McIntyre's band.

Woolsey contended that his operations consisted entirely of private contracts under which he arranged for the lease of an aircraft by each of the performers and then provided a flight crew. The court noted that Woolsey actively solicited business from entertainers and represented that his

---

[927] *Id.*

[928] *Johnson*, 979 F.2d at 623 (emphasis added).

[929] 993 F.2d 516 (5th Cir. 1993).

[930] The 25 artists listed in a "thank you note" to clients included: Reba McIntyre, Billy Joel, Ricky Scaggs, Larry Gatlin and the Gatlin Brothers, the Jerry Garcia Band, Duran Duran, Chicago, Kiss, Alice Cooper, Clint Black, Europe, Arron Tippon, Cinderella, Robert Plant, White Snake, Jimmy Buffet, U-2, Depeche Mode, Stevie Nicks, the Judds, Don Williams, Sawyer Brown, Chet Atkins, the Grateful Dead, and Garrison Keillor. *Id.* at 517 n.1.

company complied with the "strict flight requirements that meet the highest Federal Aviation Regulations."[931]

The FAA contended that Woolsey was providing common carriage and was subject to the requirements of FAR Part 135. Woolsey argued that he was not holding himself out to the "public," but was merely sending out invitations to a selected group to negotiate contracts on a case-by-case basis, "without any evidence of uniformity of charges or willingness to carry all persons applying so long as there is room in the aircraft."[932]

The FAA contended that common carriage did not require a holding out to the public at large, but merely to an identifiable segment of the public. Moreover, there was no evidence that Woolsey had ever turned away anyone in the music industry able to pay for his services.

Woolsey also contended that the absence of uniform tariffs precluded a finding of common carriage, but the court gave deference to the FAA's argument that the absence of tariffs or rate schedules, ". . . or [even] occasional refusals to transport, are not conclusive proof that the carrier is not a common carrier."[933]

Woolsey also contended that he charged no more than was permitted under the timesharing regulations of FAR Part 91.501(c)(1). Nevertheless, the court concluded that timesharing regulations only apply to private or contract carriers and not to common carriers.[934] The court concluded that:

> The objective conduct of [Woolsey's company] holding out its services to the music industry and actually serving scores of different musicians, makes [the company's] operations subject to FAR Part 135. The subjective intentions of Woolsey are not controlling. It is the objective conduct of himself and his corporation which bring their actions under FAR Part 135. The Federal Aviation Regulations are primar-

---

[931] *Id.* at 519 n.9.

[932] *Id.* at 522.

[933] *Id.* at 524 (quoting Advisory Circular No. 120-12A, April 24, 1986, at 1).

[934] *Woolsey*, 993 F.2d at 524.

> ily designed to protect the public safety, *and not the private contractual aspirations of given parties.*[935]

C. APPEAL

The reviewability of FAA revocation of an FAA-designated Pilot Examiner Designation was the subject of *Adams v. Federal Aviation Administration.*[936] In that case, the Ninth Circuit concluded that there were no "judicially manageable standards" by which it might review the FAA administrator's decision not to review a designation as a Pilot Examiner.[937] The court noted:

> Agency action is unreviewable when "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. . . . Such a determination is statute specific and relates to the language of the statute and whether the general purposes of the statute would be endangered by judicial review.[938]

The court also noted that the Federal Aviation Act specifically authorizes the Secretary of Transportation to rescind any delegation "at any time and for any reason which he deems appropriate."[939] This statutory language supported the conclusion that rescission of an FAA Designated Examiner's Certificate was entirely within the discretion of the FAA.[940]

In *Green v. Brantley*[941] the issue of jurisdiction to review FAA orders apparently was reviewed *sua sponte* by the Eleventh Circuit Court of Appeals in an appeal from a district court decision pertaining to a constitutional attack on the revocation of a Flight Examiner's authorization. The FAA, through its representatives, had revoked Flight Examiner

---

935 *Id.* at 525 (emphasis added).

936 1 F.3d 955 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 690 (1994).

937 *Id.* at 956.

938 *Id.* (citations omitted).

939 *Id.*

940 *Id.*

941 981 F.2d 514 (11th Cir. 1993).

Green's authorization to conduct flight tests for certification of pilots.

Rather than challenging this revocation by an appeal to the U.S. Court of Appeals for the Eleventh Circuit pursuant to 49 U.S.C. § 1486, Pilot Examiner Green's attorney filed a constitutional challenge, alleging both a conspiracy to deprive Flight Examiner Green of a valuable property right and also a conspiracy to violate his First Amendment rights as a result of testimony he gave against the United States in an unrelated action. The FAA employees denied that they had acted improperly and further claimed qualified immunity under *Mitchell v. Forsyth*.[942] The U.S. District Court for the Northern District of Georgia held that there was a jury question as to qualified immunity and denied their motion for summary judgment.[943] On appeal, the Eleventh Circuit did not reach the merits of the summary judgment issues, stating that the court had the obligation to "satisfy itself not only of its own jurisdiction, *but also that of the lower courts in a cause under review.*"[944]

The Eleventh Circuit then reviewed the jurisdiction of the district courts under 28 U.S.C. § 1332(a) and concluded that the constitutional challenges against the FAA employees were intertwined with the procedural and substantive merits of the FAA's revocation action and that such constitutional challenge constituted an impermissible collateral attack on a final FAA order.[945]

The court stated that the letter to Mr. Green revoking his Flight Examiner designation possessed the requisite finality, and even the correspondence itself might be a sufficient record for review of the Agency action.[946] Accordingly, the court held that the proper method of review of the FAA action would have been to file a petition within sixty days of

---

[942] 472 U.S. 511 (1985).

[943] *Green*, 981 F.2d at 519.

[944] *Id.* at 516 (emphasis added) (citation omitted).

[945] *Id.* at 520.

[946] *Id.* at 521.

the FAA order in the appropriate court of appeals pursuant to Section 1006 of the Federal Aviation Act.[947]

The Eleventh Circuit declined to exercise jurisdiction to accept review of the FAA order, stating that Flight Examiner Green had failed to file that petition within sixty days after the order was issued and had not demonstrated "reasonable grounds for failure to file."[948]

The issue of bankruptcy court jurisdiction over review and enforcement of an FAA emergency revocation order was presented in *In re Horizon Air, Inc.*[949] where the FAA issued an emergency order revoking the air carrier operating certificate of Horizon Air a Chapter 11 debtor. Horizon Air immediately petitioned the bankruptcy judge for a temporary restraining order enjoining enforcement of the emergency revocation order. A series of appeals were filed to the U.S. district judge, culminating in the following decision.

The district court held that the Bankruptcy Code grants subject matter jurisdiction over bankruptcy matters to the U.S. district courts.[950] The grant of jurisdiction extends to all civil proceedings which "arise under" or "arise in" Chapter 11 bankruptcy proceedings.[951] These proceedings specifically include orders to turn over property of the estate under 28 U.S.C. § 157(b)(2).[952]

An emergency revocation of an air carrier operating certificate was deemed by the court to be an order to turnover property of the estate.[953] The district court rejected a series of decisions in which FAA landing slots had been deemed not to be property of the estate.[954] The court held that the air carrier operating certificate was property of the estate;

---

[947] *Id.*; *see* 49 U.S.C. app. § 1486 (1988).

[948] *Green*, 981 F.2d at 521 n.2.

[949] 156 B.R. 369 (Bankr. N.D.N.Y. 1993).

[950] *Id.* at 372; *see* 28 U.S.C. §§ 157, 1334 (1988).

[951] *In re Horizon Air, Inc.*, 156 B.R. at 375.

[952] *Id.*

[953] *Id.*

[954] *Id.* at 376.

therefore, the federal district court had subject matter jurisdiction over the FAA's action requiring its revocation.[955]

The court further noted that, pursuant to 11 U.S.C. § 362(b)(4), the automatic stay would not apply to "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power."[956] Accordingly, if the district court were to conclude that the FAA acted properly, then the automatic stay would be lifted.[957] Conversely, if the governmental unit had not acted properly, then the automatic stay would remain in force.[958] Based upon this analysis, along with the express waiver of sovereign immunity in 11 U.S.C. § 106(c), the court also concluded that the United States was subject to personal jurisdiction in the district court for purposes of the automatic stay.[959]

Finally, the court evaluated the question of whether the grant of jurisdiction to review FAA administrative decisions to the U. S. Circuit Courts of Appeals under 49 U.S.C. § 1486 precluded the exercise of district court jurisdiction. The court held that the U. S. district courts and the U.S. circuit courts of appeals had concurrent jurisdiction, the district court under the bankruptcy law, and the U. S. circuit courts of appeals under the Federal Aviation Act.[960] The district court concluded that referring this case to the U. S. circuit court of appeals would not be in the interest of an expeditious disposition of this matter (which involved a hearing on a preliminary injunction within days of the court's order).[961] Instead, the court held that retaining jurisdiction would result in the most expeditious resolution of

---

[955] *Id.* at 377.

[956] *In re Horizon Air, Inc.*, 156 B.R. at 375.

[957] *Id.*

[958] *Id.*

[959] *Id.*

[960] *Id.* at 378.

[961] *In re Horizon Air, Inc.*, 156 B.R. at 378.

the matter and therefore retained jurisdiction pursuant to Title 11 of the Bankruptcy Code.[962]

D. FORFEITURE

The operation and seizure of an unregistered helicopter was the subject of *United States v. One Helicopter*.[963] Under the amendments to the Federal Aviation Act, 49 U.S.C. § 1472(b)(1)(C), "it is unlawful for any person, who is the owner of an aircraft eligible for registration, to knowingly and willfully operate, attempt to operate, or permit any other person to operate such aircraft if the aircraft is not registered under 49 U.S.C. § 1401."[964] Furthermore, pursuant to §1472(b)(3)(A), an aircraft used in connection with aiding or facilitating a violation of paragraph 1, whether or not a person is charged in connection with such violation, may be seized and subjected to forfeiture by the Drug Enforcement Administration.[965]

In this case, no attempt had been made by the owner of the aircraft either to file the bill of sale or to register the aircraft with the FAA Aircraft Registry. Additionally, the alleged existence of a dispute as to title was irrelevant in that the "owner" for purposes of registration was deemed to include a "buyer in possession" and application of the statute is not limited to those with "perfect title."[966] Accordingly, the "buyer in possession" was required to register the air-

---

[962] *Id.* The distinction between this case and other cases which have concluded that only the U. S. circuit courts of appeal have jurisdiction to review FAA actions pursuant to 49 U.S.C. App. § 1486 is that the Bankruptcy Code contains an express grant of federal subject matter jurisdiction for matters related to the debtor. In other cases in which the district courts have been denied original jurisdiction, there has been no specific grant of federal district court jurisdiction other than general federal question jurisdiction. 28 U.S.C. § 1331 (1988). Further, in Green v. Brantley, 981 F.2d 514, 520 (11th Cir. 1993), the court concluded that the suit against individual FAA employees under 28 U.S.C. § 1331, was merely a "back door" attempt to seek review of the agency action in the district court, contrary to the exclusive provisions of 49 U.S.C. § 1486. *Id.*

[963] No. 90-C6777, 1993 U.S. Dist. LEXIS 7749 (N.D. Ill. June 4, 1993).

[964] *Id.* at *1.

[965] *Id.* at *2.

[966] *Id.* at *7.

craft and the failure to do so resulted in forfeiture of the aircraft to the United States Government.[967]

E. Attorneys' Fees

In *Smith v. NTSB*[968] the pilot appealed the NTSB reversal an award of attorneys fees' under 5 U.S.C. § 504(a)(1). Pilot Smith was charged with violating FAR § 91.75(a) and (b) (prohibiting deviation from air traffic controller's instructions), § 91.9 (prohibiting careless or reckless operation of aircraft), and § 61.3(c) (requiring pilots to have a current medical certificate). Pilot Smith allegedly deviated from his assigned altitude resulting in a near-miss alarm at Chicago Center. Smith contended that he was responding to an air traffic control instruction at the time of his descent. Immediately after the near-miss alarm, the radar controller responsible for the sector contacted Smith and, as stated by the court, "in what can be charitably described as 'unprofessional' and 'colorful' language, asked Smith what he was doing and ordered him to maintain an altitude of 5,000 feet."[969]

Following the incident, the voice tape of the radar side transmissions which normally would have contained the instruction to descend was found to contain only static. It was also determined that the radar and manual controller had visited the recording room immediately after the incident. There was absolutely no explanation for why static was on the tape or why the controllers had been present in the room in which the recording equipment was located immediately after the incident. The FAA attorneys conceded that this was the first time they had ever been involved in a prosecution in which the radar tape was unavailable. The administrative law judge dismissed the charges and granted the request for attorneys' fees.[970]

---

[967] *Id.* at *9.

[968] 992 F.2d 849 (8th Cir. 1993).

[969] *Id.* at 851.

[970] *Id.*

The Eighth Circuit reviewed the record and determined that the "record as a whole gives rise to a strong suspicion that, as stated by the ALJ, 'something was wrong in the State of Denmark, . . .' but the FAA [in proceeding with the prosecution] chose to ignore certain facts and simply failed to discover others."[971] On these grounds, the Eighth Circuit held that there was no substantial evidence which would justify the conclusion that there was a reasonable basis in truth for the facts alleged in the pleadings, that a reasonable basis existed in the law for the theory propounded by the FAA, or that the facts alleged would reasonably support the legal theory advanced.[972] The Eighth Circuit reversed the NTSB's decision that the FAA's decision to proceed based solely on the statements of the air traffic controllers was substantially justified.[973]

F. MISCELLANEOUS

The liability of the federal government for failing to issue a registration certificate for an aircraft was the subject of *Koppie v. United States*.[974] In this case, Koppie had satisfied a garnishment lien which he contended resulted in his obtaining title to the subject aircraft. Unbeknownst to Koppie, however, the aircraft had been repossessed, and the repossession and subsequent sale of the aircraft had been recorded in the FAA aircraft registry. Accordingly, the FAA would not issue a certificate of registration to him because he was not shown to be the owner of the aircraft.

Relying upon provisions of the Federal Aviation Act which state that registration of an aircraft shall not be "evidence of ownership," the Seventh Circuit held that any decision that the FAA made to deny issuance of a registration certificate could not have harmed Koppie as it was not evidence of ownership.[975] The court did not address the addi-

---

[971] *Id.* at 852 (citations omitted).
[972] *Id.*
[973] 992 F.2d at 852-53.
[974] 1 F.3d 651 (7th Cir. 1993).
[975] *Id.* at 653.

tional defenses that the FAA was barred both by the Federal Tort Claims Act exception for discretionary functions and by the doctrine of collateral estoppel because the ownership issue had been decided adversely to Koppie.[976]

XI. DEBTOR-CREDITOR

The determination of the scope of an aircraft security agreement with regard to certain components installed in the aircraft after the security agreement was granted is the subject to *First Fidelity National Bank v. Eastern Airlines, Inc.*[977] This case demonstrates the application of the adage that "more may be less" in defining the scope of a security agreement. The case involved the installation of TCAS collision avoidance systems in certain Eastern Airlines aircraft subject to a security agreement. The security agreement specifically stated that certain parts subsequently installed on the aircraft would not be included as part of the collateral if the following conditions were met:

> (1) The Part was not installed or attached to "an Airframe or Engine in order to cause *such Airframe* or Engine to be in compliance with any ruling, regulation, order or other action of the FAA[;]" *and*
> (2) The Part could be removed without "impairing the airworthiness" of the Airframe or Engine; *and either*
> (3) (a) The parts were "additions to and [were] not in replacement or renewal or substitution for, Parts incorporated or installed in or attached to such Airframe or Engine on the Delivery Date"; or (b) the removal of the Part did "not diminish the value of the Aircraft or Engine from which it [was] removed in any material respect."[978]

The court concluded that while certain components of the overall TCAS system were "replacements" (such as radar, transponders, vertical speed indicators, and other instruments), and, were therefore part of the collateral, the

---

[976] *Id.*
[977] 147 B.R. 325 (Bankr. S.D.N.Y. 1992).
[978] *Id.* at 328.

TCAS systems processors were not replacements.[979] Furthermore, those parts were not installed or attached in order to cause the "Airframe" to be in compliance with any ruling, regulation, order or other action by the FAA.[980] Instead, Eastern had been required to install TCAS systems in twenty percent of its fleet at the time the systems were installed, and such a requirement was a "fleet" requirement and not one relating to "such Airframe."[981] Accordingly, if removal of the part did not "diminish the value of the aircraft," the TCAS system processors would *not* be a part of the collateral.[982] Nevertheless, the court held that questions of fact existed as to whether the removal of the TCAS system diminished the value of the aircraft and therefore denied the summary judgment motions of both parties.[983] In this case, the exclusion of certain after installed parts from the collateral may have reduced the value of the collateral, and the exclusion of each of its additional sub-parts, may have further reduced the value of the collateral. These were offset, however, by the exception which the drafters of the security agreement incorporated in order to assure that the basic value of the collateral was not adversely affected.

---

[979] *Id.* at 328-29.
[980] *Id.* at 328.
[981] *Id.*
[982] *First Fidelity Nat'l Bank*, 147 B.R. at 329.
[983] *Id.* at 330.